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## The Good Faith Exception to the Exclusionary Rule: *United States v. Leon* and *Massachusetts v. Sheppard*

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**The Good Faith Exception to the Exclusionary Rule: *United States v. Leon*<sup>1</sup> and *Massachusetts v. Sheppard*<sup>2</sup>** — The fourth amendment prohibits unreasonable searches and seizures and requires that warrants which authorize searches be based on probable cause.<sup>3</sup> The amendment also requires that warrants particularly describe the place to be searched and the persons or things to be seized. The exclusionary rule<sup>4</sup> is a judicially created doctrine used to effectuate the commands of the fourth amendment. The rule dictates that evidence obtained in violation of the fourth amendment may not be used by the government in prosecuting those persons whose rights have been violated.<sup>5</sup> Since 1914, when it was first adopted by the Supreme Court in *Weeks v. United States*, the exclusionary rule has been embroiled in controversy.<sup>6</sup> Proponents claim that the exclusionary rule is the only effective method by which courts can safeguard the rights guaranteed by the fourth amendment.<sup>7</sup> Detractors believe that the rule is not justified in light of the burden which it imposes on effective law enforcement.<sup>8</sup>

Much of the debate has centered on the purposes of the fourth amendment exclusionary rule.<sup>9</sup> Two competing schools of thought have developed. One view contends that the application of the exclusionary rule should be limited to situations where it

<sup>1</sup> 104 S. Ct. 3405 (1984).

<sup>2</sup> 104 S. Ct. 3424 (1984).

<sup>3</sup> The fourth amendment provides:

The right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

<sup>4</sup> See *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914).

<sup>5</sup> See *Mapp*, 367 U.S. at 655; *Weeks*, 232 U.S. at 398.

<sup>6</sup> See generally *Stone v. Powell*, 428 U.S. 465, 489–90 (1976); *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 411 (1970) (Burger, J., dissenting); Kamisar, *Does (Did) (Should) The Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition?"*, 16 CREIGHTON L. REV. 565 (1983); LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. PITT. L. REV. 307 (1982); Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365 (1981); Schrock & Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974); Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365 (1983); Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257 (1984).

<sup>7</sup> See, e.g., Stewart, *supra* note 6, at 1380–85.

<sup>8</sup> See, e.g., *Bivens*, 403 U.S. at 411 (Burger, J., dissenting). Justice Burger stated:

For more than 55 years this Court has enforced a rule under which evidence of undoubted reliability and probative value has been suppressed and excluded from criminal cases whenever it was obtained in violation of the Fourth Amendment . . . . Notwithstanding its plausibility, many judges and lawyers and some of our most distinguished legal scholars have never quite been able to escape the force of Cardozo's statement of the doctrine's anomalous result: "The criminal is to go free because the constable has blundered . . . . A room is searched against the law, and the body of a murdered man is found . . . . The privacy of the home has been infringed, and the murderer goes free." *People v. Defore*, 242 N.Y. 13, 21, 23–24, 150 N.E. 585, 587, 588 (1926).

*Id.* at 412–13.

<sup>9</sup> In large part, this can be attributed to the fact that the underlying rationale of the rule was not explicitly articulated in the cases in which the rule was born. See Stewart, *supra* note 6, at 1372.

serves to deter police from conducting illegal searches.<sup>10</sup> Commentators who subscribe to this view contend that where the costs to effective law enforcement outweigh any deterrent value in using the rule, the admission of illegally seized evidence does not constitute an independent fourth amendment violation.<sup>11</sup> The opposing school of thought takes a broader view, asserting that the purpose of the rule is to restrain the government as a whole in its attempts to discover and punish lawbreakers.<sup>12</sup> Under this view, the effect of the exclusion of evidence on future police lawlessness is relevant but not dispositive in determining whether the rule should be applied in a particular instance.<sup>13</sup>

In *United States v. Leon*,<sup>14</sup> the Supreme Court was asked to decide whether evidence obtained in a police search should be barred from use in the prosecution's case-in-chief where an officer reasonably relies on a warrant which is later found to be invalid. In *Massachusetts v. Sheppard*,<sup>15</sup> the Court addressed the issue of whether evidence obtained during a search pursuant to a warrant that failed to provide an accurate description of the items to be seized should be admitted. These decisions are the latest in a long line of cases in which members of the Court debated the proper scope of the fourth amendment exclusionary rule.<sup>16</sup>

In *Leon*, a confidential informant of unproven reliability informed an officer of the Burbank, California Police Department that two persons known to him as "Armando"

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<sup>10</sup> See, e.g., *United States v. Calandra*, 414 U.S. 338, 343 (1974).

<sup>11</sup> See *id.* at 354. According to this "fragmentary" view, the court acts as a neutral conduit of evidence. In effect, whatever "taint" might have accrued from the illegal seizure is "laundered" as it passes through the hands of the judiciary. See Schrock & Welsh, *supra* note 6, at 251.

<sup>12</sup> See *Calandra*, 414 U.S. at 356-57 (Brennan, J., dissenting). This is called the "unitary" model of prosecution. According to the unitary model, by excluding evidence "the court stops the entire government, of which it is a part, from consummating a wrongful course of conduct — a course of conduct begun but by no means ended when the police invade the defendant's privacy." Schrock & Welsh, *supra* note 6, at 257-60. See also Kamisar, *supra* note 6, at 589 n.160, 639. The *Weeks* Court adhered to this view. See *Weeks*, 232 U.S. at 391-93.

<sup>13</sup> See *Calandra*, 414 U.S. at 356-57 (Brennan, J., dissenting).

<sup>14</sup> 104 S. Ct. 3405 (1984).

<sup>15</sup> 104 S. Ct. 3424 (1984).

<sup>16</sup> See, e.g., *United States v. Havens*, 446 U.S. 620 (1980) (defendant's statements made in response to proper cross-examination are subject to impeachment by government by illegally seized evidence which is inadmissible as substantive evidence of guilt); *Michigan v. DeFillippo*, 443 U.S. 31 (1979) (need not exclude fruits of a search incident to an arrest made in good faith reliance on a substantive criminal statute subsequently declared unconstitutional); *Rakas v. Illinois*, 439 U.S. 128 (1978) (standing to invoke the exclusionary rule limited to cases in which the prosecution seeks to use the fruits of an illegal search or seizure against the victim of police misconduct); *United States v. Ceccolini*, 435 U.S. 268 (1978) (witness's testimony may be admitted even though his or her identity was discovered in an unconstitutional search); *Stone v. Powell*, 428 U.S. 465 (1976) (where a state has provided a full and fair opportunity to litigate a fourth-amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence was obtained through an unconstitutional search and seizure); *United States v. Janis*, 428 U.S. 433 (1976) (illegally seized evidence may be admitted in federal civil trials); *United States v. Calandra*, 414 U.S. 338 (1974) (declined to allow grand jury witnesses to refuse to answer questions based on illegally seized evidence); *Alderman v. United States*, 394 U.S. 165 (1969) (persons aggrieved solely by the introduction of damaging evidence unlawfully obtained from their co-conspirators or co-defendants cannot seek suppression of the evidence); *Linkletter v. Walker*, 381 U.S. 618 (1965) (the exclusionary rule announced in *Mapp* does not apply to state court convictions which had become final before its rendition).

and "Patsy" were selling large quantities of cocaine and methaqualone from their residence at 620 Price Drive in Burbank.<sup>17</sup> The informant also indicated that he had witnessed a sale of methaqualone by Patsy at the residence approximately five months before and had observed at that time a shoebox containing a large amount of cash that belonged to Patsy.<sup>18</sup> The informant stated that Armando and Patsy kept only small quantities of drugs at their residence and stored the remainder at another location in Burbank.<sup>19</sup>

On the basis of this information, the Burbank police initiated an extensive investigation which focused first on the Price Drive residence and later on residences at Via Magdalena and Sunset Canyon.<sup>20</sup> Cars parked at the Price Drive residence were determined to belong to respondents Armando Sanchez and Patsy Stewart.<sup>21</sup> During the investigation, officers had observed an automobile belonging to respondent Richard Del Castillo arriving at the Price Drive residence.<sup>22</sup> The driver entered the house and left with a small paper sack.<sup>23</sup> A check of Del Castillo's probation records led police to respondent Alberto Leon, who was listed as Del Castillo's employer.<sup>24</sup>

Subsequently, the officers observed several persons, at least one of whom had prior drug involvement, arriving at the Price Drive residence and leaving with small packages.<sup>25</sup> The officers also observed Sanchez and Stewart board separate flights for Miami.<sup>26</sup> Both Sanchez and Stewart later returned to Los Angeles by plane.<sup>27</sup> At the airport Sanchez and Stewart consented to a search of their luggage.<sup>28</sup> The search uncovered a small amount of marijuana.<sup>29</sup> Based on these and other observations summarized in an affidavit, an experienced and well trained narcotics investigator of the Burbank Police Department prepared an application for a warrant to search the three residences and automobiles registered to each of the respondents for evidence of drug trafficking activity.<sup>30</sup>

Several deputy district attorneys reviewed the extensive application prepared by the police officer.<sup>31</sup> A state superior court judge then issued a facially valid search warrant.<sup>32</sup>

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<sup>17</sup> *Leon*, 104 S. Ct. at 3409.

<sup>18</sup> *Id.* at 3409-10.

<sup>19</sup> *Id.* at 3410.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* Sanchez had previously been arrested for possession of marijuana. Stewart had no criminal record. *Id.*

<sup>22</sup> *Id.* Del Castillo had previously been arrested for possession of fifty pounds of marijuana. *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* Leon had been arrested in 1980 on drug charges and Leon's companion informed police at that time that Leon was heavily involved in the importation of drugs to this country. Before the current investigation, an informant had informed police that Leon stored a large quantity of methaqualone at his residence. During this investigation, the Burbank police learned that Leon was living at 716 South Sunset Canyon in Burbank. *Id.*

<sup>25</sup> *Id.* at 3410. The Court mentioned that a variety of other activity was observed at the Price Drive and Sunset Canyon residences as well as at a condominium at Via Magdalena. Activity involving respondents' automobiles also was noted. *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

The ensuing searches netted large quantities of drugs at the Via Magdalena and Sunset Canyon residences and a small quantity at the Price Drive residence.<sup>33</sup> Respondents were indicted in the United States District Court for the Central District of California and charged with conspiracy to possess and distribute cocaine and a variety of other substantive counts.<sup>34</sup>

The respondents filed pretrial motions to suppress the evidence seized pursuant to the warrant.<sup>35</sup> The district court held an evidentiary hearing and granted the motions to suppress in part,<sup>36</sup> concluding that the affidavit was insufficient to establish probable cause.<sup>37</sup> The court made clear the fact that the officers who conducted the search had acted in good faith.<sup>38</sup> The court, however, refused the government's invitation to rule that the fourth amendment exclusionary rule should not apply where evidence is seized in reasonable, good faith reliance on an invalid warrant, and instead relied upon the existing law of the United States Court of Appeals for the Ninth Circuit.<sup>39</sup> Thus, the district court only ruled on the probable cause question and suppressed the evidence on the grounds that probable cause was lacking.<sup>40</sup>

The district court denied the government's motion for reconsideration and the Ninth Circuit affirmed.<sup>41</sup> The court of appeals concluded that the information provided by the informant failed to satisfy the two-prong test for probable cause established by the Supreme Court in *Aguilar v. Texas*<sup>42</sup> and *Spinelli v. United States*.<sup>43</sup> As it was further found that these deficiencies had not been cured by independent police investigation, the court ruled that the affidavit did not establish probable cause.<sup>44</sup>

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<sup>33</sup> *Id.* Other evidence was discovered at each of the residences and in Stewart's and Del Castillo's automobiles. *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 3410-11. The Court did not suppress all of the evidence as to all of the respondents because none of the respondents had standing to challenge all of the searches. *Id.*

<sup>37</sup> *Id.* at 3411.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 3411 n.4.

<sup>40</sup> *Id.* at 3411.

<sup>41</sup> *Id.*

<sup>42</sup> 378 U.S. 108 (1964).

<sup>43</sup> 393 U.S. 410 (1969). Under this test the affidavit must: (1) set forth the basis of the informant's knowledge of criminal activity and (2) must establish the informant's credibility. *See id.* at 415-16. In *Illinois v. Gates*, 462 U.S. 213 (1983), the Court abandoned the two-pronged *Aguilar-Spinelli* test for determining whether an informant's tip suffices to establish probable cause for the issuance of a warrant, and substituted a "totality of circumstances" approach. In *Gates*, the Court stated:

The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . concluding" that probable cause existed.

*Id.* at 238-39.

The Court's adoption of this less restrictive *Gates* test occurred after the Ninth Circuit decided *Leon*.

<sup>44</sup> *Leon*, 104 S. Ct. at 3411.

The government's petition for certiorari expressly declined to seek review of the lower court's determination that the warrant was unsupported by probable cause.<sup>45</sup> The only question presented was "[w]hether the fourth amendment exclusionary rule should be modified so as not to bar the admission of evidence seized in reasonable, good-faith reliance on a search warrant subsequently held to be defective."<sup>46</sup> The Supreme Court granted certiorari.<sup>47</sup>

In *Leon*, a six-to-three majority<sup>48</sup> of the Supreme Court held that the fourth amendment exclusionary rule should not be applied so as to bar use in the prosecution's case-in-chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but found ultimately to be invalid.<sup>49</sup> The Court noted that little or no deterrent effect could be achieved against officers who had acted in reasonable, good-faith reliance on a warrant.<sup>50</sup> The Court, therefore, concluded that the minimal deterrent value that the exclusion of evidence would have in these circumstances is outweighed by the social cost such exclusion would exact.<sup>51</sup>

*Massachusetts v. Sheppard*,<sup>52</sup> a case decided on the same day as *Leon*, involved a murder investigation in which the badly burned body of a woman was discovered in a vacant lot in the Roxbury section of Boston.<sup>53</sup> After a brief investigation, the police decided to question one of the victim's boyfriends, Osborne Sheppard.<sup>54</sup> Sheppard said that he had been playing cards at a local gaming house from 9 p.m. Friday to 5 a.m. Saturday, the night of the murder.<sup>55</sup> The police learned, however, that although Sheppard was there that night, he had borrowed an automobile at about 3 a.m. Saturday morning to give two men a ride home.<sup>56</sup>

On Sunday morning, the owner of the car that Sheppard had borrowed consented to a police inspection of the vehicle.<sup>57</sup> Bloodstains and strands of hair were found on the bumper and in the trunk of the car.<sup>58</sup> Also in the trunk were strands of wire similar to wire found on the victim.<sup>59</sup> On the basis of this evidence, detective Peter O'Malley drafted an affidavit designed to support an application for an arrest warrant and a search warrant authorizing a search of Sheppard's residence.<sup>60</sup>

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<sup>45</sup> *Id.* at 3412.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Chief Justice Burger and Justices White, Blackmun, Powell, Rehnquist, and O'Connor constituted the majority, while Justices Brennan, Marshall and Stevens dissented.

<sup>49</sup> *Leon*, 104 S. Ct. at 3416. Although the Court recognized that it could consider the question whether probable cause existed under the new *Gates* standard, it assumed that probable cause was absent, as the lower court found. *Id.* at 3412.

<sup>50</sup> *Id.* at 3420.

<sup>51</sup> *Id.* at 3421.

<sup>52</sup> 104 S. Ct. 3424 (1984).

<sup>53</sup> *Id.* at 3426.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Even though the trip normally only took 15 minutes, Sheppard did not return for nearly two hours. *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 3426-27. The affidavit set forth the results of the investigation and stated that the police wished to search for:

Detective O'Malley showed the affidavit to the district attorney and the district attorney's first assistant, who concluded that it set forth probable cause for the arrest and search.<sup>61</sup> Because it was Sunday and the local court was closed, the police had a difficult time finding a warrant application.<sup>62</sup> Detective O'Malley found a warrant form used for controlled substances.<sup>63</sup> Knowing that changes had to be made on the form, he struck the subtitle "controlled substance."<sup>64</sup> The reference to "controlled substances," however, was not deleted in the part of the form that constituted the warrant application and that when signed, would constitute the warrant itself.<sup>65</sup>

Officer O'Malley took the affidavit and warrant form to a judge who stated he would authorize the search.<sup>66</sup> The judge assured O'Malley he would make the necessary changes and indeed made some changes before dating and signing the warrant.<sup>67</sup> He did not, however, change the substantive part of the warrant, which continued to authorize a search for controlled substances, nor did he alter the form so as to incorporate the affidavit.<sup>68</sup> O'Malley took the warrant and affidavit, and accompanied by other officers, proceeded to Sheppard's residence.<sup>69</sup> The scope of the ensuing search was limited to the items listed in the affidavit and several incriminating pieces of evidence were discovered.<sup>70</sup> Sheppard was then charged with first degree murder.<sup>71</sup>

At a pretrial suppression hearing, the trial judge concluded that the warrant failed to conform to the commands of the fourth amendment because it did not particularly describe the items to be seized.<sup>72</sup> The judge ruled, however, that the evidence could be admitted notwithstanding the defect in the warrant because the police had acted in good-faith in executing what they reasonably thought was a valid warrant.<sup>73</sup>

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[A] fifth bottle of amaretto liquor, two nickel bags of marijuana, a woman's jacket that has been described as black-grey (charcoal), any possessions of Sandra D. Boulware, similar type wire and rope that match those on the body of Sandra D. Boulware, or in the above Thunderbird. A blunt instrument that might have been used on the victim, men's or women's clothing that may have blood, gasoline burns on them. Items that may have fingerprints of the victim.

*Id.*

The liquor and marijuana were included in the request because Sheppard had told police that when he was last with the victim, the two had purchased these things before going to his residence.

*Id.* at 3426-27, 3427 n.1.

<sup>61</sup> *Id.* at 3427.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* The form was entitled Search Warrant-Controlled Substance, Mass. Gen. Laws ch. 276 §§ 1 through 3A (West 1972). *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* These oversights became significant because they made the warrant vulnerable to attack for being facially deficient due to failure to describe particularly the things to be seized. Such particularity is, of course, a requirement of the fourth amendment.

<sup>69</sup> *Id.* at 3427-28.

<sup>70</sup> *Id.* The police found a pair of bloodstained boots, bloodstains on the concrete floor, a woman's earring with blood on it, a bloodstained envelope, a pair of men's jockey shorts and women's leotards with blood on them, three types of wire, and a woman's hairpiece, subsequently identified as the victim's. *Id.* at 3428 n.4.

<sup>71</sup> *Id.* at 3428.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

On appeal, the Supreme Judicial Court of Massachusetts decided that the evidence should be suppressed.<sup>74</sup> A plurality concluded that although the police acted in reasonable, good-faith reliance on the warrant, the evidence had to be excluded because the United States Supreme Court had not recognized a good-faith exception to the exclusionary rule.<sup>75</sup> The Supreme Court granted certiorari and set the case for argument in conjunction with *United States v. Leon*.<sup>76</sup>

In applying the *Leon* "good-faith exception" rule in *Sheppard*, the Court held that the evidence against the defendant should be admitted despite the fact that the warrant failed to describe particularly the items to be seized.<sup>77</sup> The Court stated that the rule was designed to deter unlawful searches by police, not to punish a magistrate's error.<sup>78</sup> The majority thus concluded that the suppression of evidence merely because a judge failed to make all of the necessary clerical changes on a warrant would not further the deterrence function of the exclusionary rule.<sup>79</sup>

The *Leon* and *Sheppard* cases are important developments in fourth amendment jurisprudence which will no doubt have a pervasive effect on law enforcement practices. The *Leon* decision provides for the admission of evidence obtained through police searches even though probable cause is lacking, so long as there is reasonable reliance on a warrant. *Sheppard* raises the possibility of the admission of evidence even though the warrant is facially deficient as long as there is reasonable reliance on that warrant. Together they mark the first time since *Weeks* that the Court has allowed the fruits of admittedly unconstitutional searches to be used in the prosecution's case-in-chief.

This casenote will begin by briefly reviewing the historical background of the exclusionary rule. Next, the casenote will discuss the reasoning of the Supreme Court in the *Leon* and *Sheppard* cases. The Court's reasoning in these two cases will then be analyzed against the historical background. First, this casenote will examine the Court's assumption in *Leon* and *Sheppard* that the sole purpose of the exclusionary rule is to deter police from conducting illegal searches. This analysis will contend that such an assumption is contrary to the purposes which the founding fathers hoped to achieve in adopting the fourth amendment, as well as to the reasoning of the judicial decisions in which the rule was formulated. Second, the majority's use of cost-benefit analysis will be examined. It will be contended that the majority's cost-benefit analysis was flawed both because the data the Court employed were inaccurate and because such data were misapplied. Finally, the deleterious effect which the *Leon* and *Sheppard* cases may have on future fourth amendment jurisprudence will be discussed.

## I. THE HISTORICAL BACKGROUND OF THE EXCLUSIONARY RULE

The history of the exclusionary rule can be divided into two fairly distinct eras during which two different purposes were offered to justify the remedy. The first era extends from the cases in which the rule was first formulated through the time of the Warren Court. During this period the unitary view of prosecution was consistently, though not always explicitly, advocated. The exclusionary rule was seen as a restraint on

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 3429-30.

<sup>78</sup> *Id.* at 3429.

<sup>79</sup> *Id.*



the judiciary as well as the executive. This era witnessed the continual expansion of the scope of the exclusionary rule, so as to prevent the admission of illegally seized evidence in any tribunal, state or federal.

The second era, which coincides with Chief Justice Burger's tenure, has been characterized by the emergence of the fragmentary model of prosecution. During this period, police deterrence has come to be perceived as the *raison d'être* of the exclusionary rule. According to this view, the judiciary plays a peripheral role in the criminal justice process, being merely a neutral conduit for evidence.<sup>80</sup> During this second era the scope of the exclusionary rule has been steadily restricted.

A. *The Traditional View: The Judiciary and Executive as Component Parts of the Evidence Gathering Process*

Nearly a century after the adoption of the fourth amendment, the problem of how best to enforce its mandates began to be addressed by the Supreme Court. Although the text of the fourth amendment does not provide remedies for its violations, the need to safeguard the amendment's guarantees led to the creation of the exclusionary rule. The cases in which the doctrine was first articulated focused on maintaining the purity of the process of "bringing proof to the aid of government."<sup>81</sup> In these cases, the fourth amendment's prohibitions were seen as operating against the government as a whole, so as to prevent it from benefiting from Constitutional violations.<sup>82</sup>

The rudiments of the fourth amendment exclusionary rule are found in the 1886 case of *Boyd v. United States*.<sup>83</sup> *Boyd* did not involve a traditional search and seizure but rather concerned subpoenas issued pursuant to an act of Congress<sup>84</sup> which gave the claimants the option of producing evidence or allowing allegations against them to be taken as true.<sup>85</sup> By excluding the evidence produced under these circumstances *Boyd* became the first judicial decision which implicitly envisioned a monolithic prosecution

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<sup>80</sup> See Schrock & Welsh, *supra* note 6, at 255-56.

<sup>81</sup> *Weeks*, 232 U.S. at 393.

<sup>82</sup> *Id.*

<sup>83</sup> 116 U.S. 616 (1886). *Boyd* involved an attempt by New York businessmen to import plate glass in violation of import and revenue laws. The government sought invoices to prove the value of the glass. Pursuant to section of the "Act of June 22, 1874," a judge issued subpoenas which were served on the claimants. The subpoenas stated that if the papers were not produced the allegations would be taken as confessed. The claimants produced the evidence but appealed on the grounds that the compelled production of the papers violated the fourth and fifth amendments. *Id.* at 618-20.

<sup>84</sup> "Act to amend the customs revenue laws, and to moietyies," ch. 391, 18 Stat. 186 (1874). Section 5 reads:

In all suits and proceedings other than criminal arising under any of the revenue laws of the United States, the attorney representing the government, whenever in his belief any business book, invoice, or paper belonging to, or under the control of, the defendant or claimant, will tend to prove any allegation made by the United States, may make a written motion, particularly describing such book, invoice, or paper, and setting forth the allegation which he expects to prove . . . and if the defendant or claimant shall fail or refuse to produce such book, invoice, or paper in obedience to such notice, the allegations stated in the said motion shall be taken as confessed, unless his failure or refusal to produce the same shall be explained to the satisfaction of the court . . .

*Id.* at 187.

<sup>85</sup> *Boyd*, 116 U.S. at 619-20.

system, any segment of which could activate the exclusionary sanction through unconstitutional conduct.<sup>86</sup>

The notion that the commands of the fourth amendment apply equally to all actors in the criminal justice system, whether officers of the executive or judicial branches, continued in the 1914 case of *Weeks v. United States*.<sup>87</sup> *Weeks*<sup>88</sup> applied the exclusionary rule to bar the admission in federal court of evidence which was obtained by federal officers in violation of the fourth amendment.<sup>89</sup> Underlying the majority's opinion was the conclusion that the admission of evidence obtained in violation of the fourth amendment, no less than its initial seizure, constituted an independent constitutional wrong.<sup>90</sup>

Because during this time the fourth amendment's prohibitions were viewed as restricting only the actions of federal officials, the *Weeks* decision resulted in a double standard whereby only federal agents and not state officials had to contend with the exclusionary sanction.<sup>91</sup> This produced an avenue through which illegally seized evidence could continue to make its way into federal courts.<sup>92</sup> In what came to be known as the "silver platter doctrine," state agents would bring illegally seized evidence to their federal counterparts who in turn would use it in federal prosecutions.<sup>93</sup>

In 1960, however, the Supreme Court struck down the "silver platter" doctrine in *Elkins v. United States*.<sup>94</sup> In *Elkins* the Court held that, regardless of what sector of the government was responsible for the transgression, unconstitutionally seized evidence may not be used against an individual whose rights have been violated.<sup>95</sup> Thus, the *Elkins* Court carried the unitary model one step further. After *Elkins* the exclusionary rule not

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<sup>86</sup> *Id.* at 633-35. The Court determined that there was an intimate relationship between the fourth and fifth amendments. The majority then equated the subpoena at issue with the compulsion of testimony to disclose the contents of the papers. The Court then concluded that the admission of the papers was a violation of the fifth amendment. Thus, under the *Boyd* decision, the fourth amendment exclusionary rule was rooted in the compulsory self-incrimination provision of the fifth amendment. *Id.*

<sup>87</sup> 232 U.S. 383 (1914).

<sup>88</sup> The majority noted that "[t]he effect of the fourth amendment is to put the courts of the United States and federal officials . . . under limitations and restraints . . ." The majority continued, "The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts . . ." *Id.* at 391-92.

<sup>89</sup> *Id.* at 398. In *Weeks*, unlike *Boyd*, the Court based its analysis strictly on the fourth amendment. Thus *Weeks* was the first formulation of the modern exclusionary rule. See *id.* at 389.

<sup>90</sup> *Id.* at 398.

<sup>91</sup> See *Elkins v. United States*, 364 U.S. 206, 210 (1960). At the time, the fourth amendment was seen as limiting federal, not state, action. *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> See *id.* It was called the "silver platter" doctrine because state law enforcement officials were said to bring illegally seized evidence to federal agents "on a silver platter." See *Lustig v. United States*, 338 U.S. 74, 78-79 (1959).

<sup>94</sup> 364 U.S. 206, 222-23 (1960). In *Elkins*, the petitioners, who had been indicted for intercepting telephone conversations, moved to suppress as evidence several tape and wire recordings which had been seized by state law enforcement officers in the home of one of the petitioners under circumstances which, two Oregon courts had found, rendered the search and seizure unlawful. *Id.* at 206-07. During the course of these state proceedings, federal officers, acting under a federal search warrant, obtained the articles from the safe-deposit box of a local bank where the state officials had placed them. Shortly after the state case was abandoned, a federal indictment was returned, and the instant prosecution followed. *Id.* at 207 n.1.

<sup>95</sup> *Id.*

only restrained the coordinate branches of the federal government with equal force, but also restrained state authorities.<sup>96</sup>

A year later in 1961, the principle that any federal-state distinctions regarding the use of unconstitutionally seized evidence are contrary to the policy of maintaining the purity of the evidence gathering process embodied in the exclusionary rule became manifest in *Mapp v. Ohio*.<sup>97</sup> In *Mapp*, the Court held that evidence seized by state officials in violation of the fourth amendment was inadmissible in state court.<sup>98</sup> Again the focus of the Court's decision was on the exclusion of tainted evidence from criminal prosecutions rather than on which branch of government or tier of the federal system committed the constitutional violation.<sup>99</sup>

In short, the early exclusionary rule cases portrayed the branches of government as mere components of a single evidence gathering and prosecution network. For fourth amendment purposes, no distinction was perceived between the procuring of evidence by law enforcement officers and its admission by courts.<sup>100</sup> Central to this unitary perspective was the concept introduced in *Weeks*, that the admission of illegally seized evidence is a separate violation of the fourth amendment.<sup>101</sup> Through this analysis the scope of the exclusionary rule was continually expanded to ensure that the products of illegal seizures could not find their way into state or federal courts.<sup>102</sup>

#### B. Police Deterrence as the Justification for the Exclusionary Rule

More recent fourth amendment cases have witnessed the ascendancy of the police deterrence rationale for the exclusionary rule, with an attendant narrowing of the scope of the rule.<sup>103</sup> Courts which espouse this theory begin with the premise, contrary to

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<sup>96</sup> *Id.* at 215.

<sup>97</sup> 367 U.S. 643 (1961). In *Mapp*, Cleveland police officers forcibly entered Mrs. Mapp's home. She demanded to see a search warrant. A paper, said to be a warrant, was held up by an officer. She grabbed the alleged warrant and placed it in her bosom. A struggle ensued in which the officers recovered the paper. An extensive search of the home was conducted. No warrant was produced at trial. *Id.* at 644-65.

<sup>98</sup> *Id.* at 660. In addition to preventing the use in state courts of illegally obtained evidence, *Mapp* put to rest the last vestige of the "silver platter doctrine" that had survived *Elkins*. Although *Elkins* disallowed use in federal courts of evidence illegally seized by state officials, until *Mapp* federal agents could hand over their ill-gotten evidence to state officials, who were free to use it in state courts. *Id.* at 658.

<sup>99</sup> *Id.* at 654-55. The Court stated that it was "clos[ing] the only courtroom door remaining open to evidence secured by official lawlessness . . . ." *Id.*

<sup>100</sup> See *Weeks*, 232 U.S. at 398.

<sup>101</sup> *Id.*

<sup>102</sup> See *Mapp*, 367 U.S. at 654-55.

<sup>103</sup> The first significant appearance of police deterrence as a rationale for limiting the scope of the exclusionary remedy was the case of *Linkletter v. Walker*, 381 U.S. 618 (1965). In *Linkletter*, the Court was presented with the question of whether the holding of *Mapp* should be retroactively applied. The Court concluded that because the misconduct had already occurred, the deterrent purpose of the rule would not be advanced by releasing prisoners convicted before *Mapp*. *Id.* at 636-77.

In the 1949 case of *Wolf v. Colorado*, the Court had implied that the purpose of exclusion was to deter police. 338 U.S. 25, 31-33 (1949). The *Wolf* Court incorporated the fourth amendment into the fourteenth, making it enforceable against the states, but held that the states need not adopt the exclusionary remedy. *Id.* at 33. Insofar as *Wolf* stood for the latter proposition, it was overruled by *Mapp*. See *Mapp*, 367 U.S. at 657. *Elkins v. United States*, 364 U.S. 206, 217 (1960), quoted with approval in *Mapp*, 367 U.S. at 656, mentioned a deterrent purpose for the rule, but did so in the

*Weeks*, that there is no separate fourth amendment violation in admitting illegally seized evidence.<sup>104</sup> The decision to admit or exclude evidence thus becomes a discretionary one. In coming to this decision judges are to look to the underlying purpose of the exclusionary rule. According to the police deterrence rationale, the prevention of unreasonable official intrusions, rather than maintaining the integrity of the criminal justice system, stands as the sole purpose of the exclusionary rule.<sup>105</sup> Therefore, the exclusionary sanction is justified only insofar as it has an impact on the future conduct of those officials who are directly involved in such intrusions by performing searches, namely the police.<sup>106</sup> In short, the applicability of the exclusionary rule becomes a function of cost-benefit analysis whereby the cost<sup>107</sup> to society of excluding the evidence is set against any benefit in the form of police compliance with the fourth amendment, which exclusion of the evidence would bring.<sup>108</sup>

Since its first significant appearance in *Linkletter v. Walker*,<sup>109</sup> where the Court refused to apply retroactively the holding of *Mapp*, the police deterrence rationale coupled with the balancing of costs and benefits has often been used to curtail the application of the exclusionary remedy. Though the Supreme Court never acceded to the use of illegally seized evidence in the prosecution's case-in-chief, the Court has allowed its use in various collateral contexts. The Court has held, for example, that illegally seized evidence may be used in federal civil trials<sup>110</sup> to impeach statements made by a defendant during proper cross-examination,<sup>111</sup> and may be used against persons who lack standing to raise a fourth amendment claim.<sup>112</sup>

Perhaps the paradigm case for the police deterrence rationale was the 1974 decision of *Calandra v. United States*.<sup>113</sup> In *Calandra*, the Court used the deterrence theory and applied cost-benefit analysis to hold that a witness before a grand jury may not refuse to answer questions on the ground that they are based on the fruits of an illegal search.<sup>114</sup>

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course of expanding the exclusionary rule, unlike later cases, which used such rationale to restrict it. In addition, while the Court spoke of deterrence, it did not specify at whom any deterrent effect was aimed. No specific mention of police deterrence was made. *Id.*

<sup>104</sup> See, e.g., *United States v. Calandra*, 414 U.S. 338, 354 (1974).

<sup>105</sup> See, e.g., *id.* at 347-48.

<sup>106</sup> See *id.* at 354.

<sup>107</sup> The cost to society of excluding evidence was encapsulated by Cardozo's epigram "[t]he criminal is to go free because the constable has blundered." *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926). The cost of the rule has been put less succinctly: the rule diverts attention at trial from the ultimate question of guilt or innocence which should be the main concern, the evidence that is sought to be excluded is generally highly probative of guilt and guilty defendants may be freed. See, e.g., *Stone v. Powell*, 428 U.S. 465, 489-90 (1976).

<sup>108</sup> See, e.g., *Calandra*, 414 U.S. at 348-52.

<sup>109</sup> 381 U.S. 618 (1965).

<sup>110</sup> *United States v. Janis*, 428 U.S. 433, 454 (1976).

<sup>111</sup> *United States v. Haven*, 446 U.S. 620, 627-28 (1979).

<sup>112</sup> See *Rakas v. United States*, 439 U.S. 128, 133 (1978); *Alderman v. United States*, 395 U.S. 165, 172 (1969).

<sup>113</sup> 414 U.S. 338 (1974).

<sup>114</sup> *Id.* at 354. In *Calandra*, the respondent's place of business was being searched by federal agents under a warrant issued in connection with a gambling investigation. *Id.* The warrant specified that the object of the search was to seize bookmaking records and wagering paraphernalia. *Id.* One agent discovered and seized a suspected loansharking record. *Id.* Subsequently, a grand jury investigating loansharking activities subpoenaed the respondent to query him on the seized evidence, but he refused to testify on fifth amendment grounds. *Id.*

The district court granted respondent's suppression motion on the grounds that the affidavit supporting the warrant was insufficient and that the search exceeded the scope of the warrant. *Id.*

The majority began by stating that the sole purpose of the exclusionary rule is the deterrence of future unlawful police conduct.<sup>115</sup> The Court then made clear that the application of the rule should be restricted to those instances where it is most effective.<sup>116</sup> The *Calandra* Court then compared the cost of excluding the illegal evidence, namely the undue disruption of the investigative functions of the grand jury, with the deterrent effect such exclusion would have on police, which the Court deemed "uncertain at best."<sup>117</sup> The Court attributed this minimal deterrent value to the fact that any incentive for police to disregard the commands of the fourth amendment merely to obtain a grand jury indictment is offset by the inadmissibility of the illegally seized evidence at the subsequent trial.<sup>118</sup> In short, the *Calandra* majority determined that the balance of costs against benefits dictated that the government prevail in this instance.<sup>119</sup> On the basis of this balancing, the *Calandra* Court concluded that the use of illegally seized evidence "works no new fourth amendment wrong."<sup>120</sup>

The prelude to *Leon* and *Sheppard* was *United States v. Williams*,<sup>121</sup> a case decided by the United States Court of Appeals for the Fifth Circuit. The issue in *Williams* was whether evidence obtained through a search incident to a warrantless arrest for which probable cause did not exist could nonetheless be admitted in the prosecution's case-in-chief when the arresting officer acted in good faith. The circuit court relied heavily on the assertion that the exclusionary rule exists only to deter police<sup>122</sup> and engaged in the balancing of social costs and deterrent benefits in resolving the case before it.<sup>123</sup> The *Williams* Court concluded that evidence is not to be suppressed where it is discovered by officers in the course of actions that are taken in good faith and in reasonable belief that they are authorized.<sup>124</sup>

Thus the historical backdrop of *Leon* and *Sheppard* is a long line of adjudication in which the Supreme Court initially employed the unitary outlook to expand the exclusionary rule. A central tenet in this theory was that a court committed an independent fourth amendment violation by admitting illegally seized evidence. Recent cases, however, have restricted the rule through the use of the fragmentary perspective. According to this view, the decision to admit illegally seized evidence becomes a discretionary one, which should be made by considering the advancement of police deterrence that exclusion in a particular instance will achieve. Up until 1984 when the *Leon* and *Sheppard* cases were decided, the Court had employed this fragmentary view to attack the outer edges of the exclusionary rule. The issue that remained open was whether the Supreme Court would utilize the fragmentary perspective to attack the very heart of the exclusionary

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The lower court further ordered that respondent need not answer any of the grand jury's questions based on the suppressed evidence. The court of appeals affirmed and the Supreme Court granted certiorari. *Id.*

<sup>115</sup> *Id.* at 347.

• <sup>116</sup> *Id.* at 348.

<sup>117</sup> *Id.* at 349.

<sup>118</sup> *Id.* at 351.

<sup>119</sup> *Id.* at 351-52.

<sup>120</sup> *Id.* at 354.

<sup>121</sup> 622 F.2d 830 (5th Cir. 1980).

<sup>122</sup> *See id.* at 840-43.

<sup>123</sup> *Id.* Once again, cost-benefit analysis came to the fore. "The costs to society of applying the rule beyond the purposes it exists to serve are simply too high . . . in this case the release of a recidivist drug smuggler . . . with few or no offsetting benefits." *Id.* at 840.

<sup>124</sup> *Id.* at 840-43.

rule, namely allowing the use of illegally seized evidence in the prosecution's case-in-chief. This issue, treated at the circuit court level in *Williams*, was finally confronted by the Supreme Court in *Leon* and *Sheppard*.

## II. THE LEON AND SHEPPARD DECISIONS: THE EMERGENCE OF A "GOOD-FAITH EXCEPTION" TO THE EXCLUSIONARY RULE

### A. *The Reasoning of the Supreme Court in United States v. Leon*

The *Leon* majority began its opinion with the contention that the exclusionary rule is a judicially created safeguard with the sole purpose of deterring police misconduct.<sup>125</sup> In accordance with this perspective the Court reasoned that the rule necessarily is not designed to punish the errors of magistrates.<sup>126</sup> The majority noted that when the victim of an unconstitutional search comes before a court his or her fourth amendment rights have already been completely compromised.<sup>127</sup> The majority stated that exclusion of evidence cannot restore the defendant's trammled rights and that, therefore, a court's decision to admit the fruits of the search cannot be seen as an independent fourth amendment violation.<sup>128</sup> The decision whether to admit or exclude evidence accordingly is removed from the realm of constitutional inquiry and becomes an issue of efficiency susceptible to resolution through cost-benefit analysis.<sup>129</sup>

Having accepted the balancing approach for determining the propriety of exclusion in a particular instance, the Court assessed the possible police deterrent benefit that the suppression of evidence in situations where the police acted in good faith would produce.<sup>130</sup> The starting point for the majority was the assertion that the exclusionary sanction is only appropriate where the fourth amendment violation is substantial and deliberate.<sup>131</sup> According to the majority, these elements are by definition lacking when an officer acts in good faith.<sup>132</sup> The Court stated that this was particularly true when an officer relies in good faith on a warrant.<sup>133</sup> The *Leon* majority reasoned that the Court cannot expect an officer to question a magistrate's probable cause determination.<sup>134</sup>

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<sup>125</sup> *Leon*, 104 S. Ct. at 3412. While the majority contends that the exclusionary rule is merely a judge-made deterrent safeguard, Justice Brennan contends that it is a necessary implied corollary to the fourth amendment. See *id.* at 3431-36 (Brennan, J., dissenting). The controversy over the jurisprudential versus constitutional nature of the exclusionary rule is beyond the scope of this casenote. For the purposes of this casenote, the majority's assertion that the rule is a judicially created remedy will be accepted. For a full discussion of this issue, see Kamisar, *supra* note 6; Schrock & Welsh, *supra* note 6; Stewart, *supra* note 6.

<sup>126</sup> *Leon*, 104 S. Ct. at 3412.

<sup>127</sup> *Id.* at 3418.

<sup>128</sup> *Id.* at 3412.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 3413. The Court stated: that "Indiscriminate application of the exclusionary rule, therefore, may well 'generat[e] disrespect for the law and the administration of justice.' Accordingly, '[a]s with any remedial devise, the application of the rule has been restricted to those areas where remedial objectives are thought most efficaciously served.'" *Id.* (citations omitted).

<sup>131</sup> *Id.* at 3419-21.

<sup>132</sup> *Id.* at 3413-14.

<sup>133</sup> *Id.* at 3419-20.

<sup>134</sup> *Id.* at 3420. The Court stated that once a warrant issues there is nothing more a police officer can do to comply with the law. *Id.*

The majority, however, stressed that the good-faith reliance on a warrant must be objectively reasonable.<sup>135</sup> Furthermore, according to the Court, this objective reasonableness standard was said to presuppose that police officers have a reasonable knowledge of what the law prohibits.<sup>136</sup> The Court took note of police training programs which make officers aware of the boundaries of the fourth amendment and the need to operate within those bounds.<sup>137</sup> The Court asserted that good faith was said to be inconsistent with ignoring the possibility of illegality when an officer's training has given him reason to be aware of the possibility that the limits of the fourth amendment are being transgressed.<sup>138</sup> The Court concluded that under circumstances of reasonable good-faith reliance on a warrant, excluding evidence would produce "marginal or non-existent benefits."<sup>139</sup>

In addressing the "cost" side of the equation, the majority contended that applying the exclusionary rule in every case without exception would unduly impede the truth-finding objective of trials.<sup>140</sup> The majority set out as costs of exclusion the loss of probative evidence<sup>141</sup> and the prospect of guilty defendants going free or receiving favorable plea bargains through the specter of potential exclusionary rule problems.<sup>142</sup> Also tipping the balance toward the cost side was what the Court viewed as the disproportionate windfall such guilty defendants receive from what are often minor fourth amendment transgressions.<sup>143</sup> Striking a balance between these "substantial" costs and the "non-existent" benefits exclusion would bring, the Court held that the exclusion of evidence is not warranted where an officer reasonably relies on a search warrant issued by a detached and neutral magistrate.<sup>144</sup>

The Court, however, was at pains to point out that the issuance of a warrant is not an automatic guarantee of the admissibility of evidence obtained in reliance on it.<sup>145</sup> The Court emphasized that under the standard established in *Leon* reliance on a warrant must be reasonable.<sup>146</sup> The majority made it clear that the *Leon* holding would not preclude inquiry into the circumstances surrounding the issuance of warrants.<sup>147</sup> The majority then set out four situations where the newly created good-faith exception would not be available.<sup>148</sup> The suppression of evidence would remain appropriate, the Court stated, if the issuing judge was misled by information which the affiant knew, or should have known was false.<sup>149</sup> The good-faith exception was also, according to the majority,

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 3420 n.20.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 3412-13. The majority cited a study to the effect that the cumulative loss due to nonprosecution or nonconviction of individuals arrested on felony drug charges is between 2.8% and 7.1%. *Id.* at 3414 n.6 (citing Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 A.B.F. RES. J. 611 at 680).

<sup>141</sup> *Leon*, 104 S. Ct. at 3412.

<sup>142</sup> *Id.* at 3412-13.

<sup>143</sup> *Id.* at 3413.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *See id.* at 3417.

<sup>147</sup> *Id.*

<sup>148</sup> *See id.*

<sup>149</sup> *Id.* at 3421-22.

inapplicable if the magistrate wholly abandons his or her judicial role.<sup>150</sup> The same holds true, the Court stated, where the warrant is based on an affidavit so lacking in indicia of probable cause as to render official reliance on it unreasonable.<sup>151</sup> Finally, the Court stated, a warrant may be so facially deficient, for example, in failing to particularize the place to be searched or the things to be seized, that officers could not reasonably presume it to be valid.<sup>152</sup>

The majority stated that it was not persuaded by arguments that a good-faith exception would preclude review of constitutional questions, thereby "freezing" the development of the fourth amendment.<sup>153</sup> The Court asserted that despite the newly created exception, the constitutionality of searches and seizures would continue to be reviewed by courts.<sup>154</sup> The majority then proceeded to address the argument that such "freezing" was inevitable because the good-faith exception would cause the underlying fourth amendment issues to fail to meet the live controversy requirement of Article III.<sup>155</sup> The Court stated that the issue of good-faith need not be decided until after the question of whether a fourth amendment violation has occurred is addressed.<sup>156</sup> The Court contended that in fact, it often may be difficult to determine whether the officers acted reasonably without resolving the fourth amendment issue.<sup>157</sup>

Looking to the facts of *Leon*, the majority found that the officers had indeed reasonably relied on a warrant issued by a detached and neutral magistrate.<sup>158</sup> The Court

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<sup>150</sup> *Id.* at 3422. The Court cited *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979), as an example of abandonment of the judicial role. In *Lo-Ji Sales*, a New York state police investigator, after purchasing and viewing two films from an adult bookstore and concluding that they were obscene, took the films to a magistrate who also viewed them. Based on the investigator's affidavit, the magistrate issued a warrant authorizing a search of the store and seizure of other copies of the two films. The magistrate also included a provision in the warrant which authorized seizure of "the following items which the court independently . . . has determined to be possessed in violation" of the law. No items were listed following this statement. Rather, the magistrate accompanied the investigator and other officers and independently reviewed films and magazines, authorizing the seizure of certain ones. The search, which took six hours, resulted in the seizure of 431 reels of film and 397 magazines. *Id.* at 321-23. The United States Supreme Court ruled that the magistrate in *Lo-Ji* had abandoned his neutral and detached role. The Court noted that he became a member of the search party and helped to conduct a generalized search under a warrant that failed to particularize the items to be seized. *Id.* at 326-28. See also *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

<sup>151</sup> *Leon*, 104 S. Ct. at 3422.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* As this casenote will later discuss (see *infra* notes 316-25 and accompanying text), critics of the majority's position in *Leon* have argued that a good-faith exception will obviate any future review of fourth-amendment issues as cases will be resolved on the narrower good faith grounds. The fear is that search and seizure will be removed from the realm of constitutional adjudication and fourth-amendment rights will turn on the factual issue of whether the requirements of good-faith reliance have been met. Such a situation is said to have the effect of stagnating the development of the fourth amendment as a body of law. See *Leon*, 104 S. Ct. at 3444-45 (Brennan, J., dissenting), discussed *infra* notes 192-200 and accompanying text.

<sup>154</sup> *Leon*, 104 S. Ct. at 3422-23.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 3422.

<sup>157</sup> *Id.* at 3423.

<sup>158</sup> *Id.* In *Leon* a tip from an informant of unproven reliability was followed by an extensive investigation of the respondents. *Id.* at 3410. An application for a search warrant, which was reviewed by several district attorneys, was submitted to a judge who issued a facially valid warrant. *Id.* at 3411.



further found that the facts in *Leon* presented none of the four situations which would preclude use of the good-faith exception to the exclusionary rule.<sup>159</sup> Concluding that no deterrence function would be served, the Court determined that the extreme sanction of exclusion was inappropriate.<sup>160</sup>

Justice Blackmun, in a short concurring opinion,<sup>161</sup> asserted that the decision to adopt a good-faith exception to the exclusionary rule should be a provisional one.<sup>162</sup> He shared the majority's position that the Court must indulge in empirical judgments as to the rule's effectiveness as a police deterrent in order to determine the rule's applicability in a particular instance.<sup>163</sup> Yet Blackmun believed that such judgments are necessarily provisional in nature.<sup>164</sup> He stated that if the good-faith exception results in a material change in police compliance with fourth-amendment standards, the Court would have to reconsider the desirability of the rule.<sup>165</sup> In short, Blackmun posited that the scope of the exclusionary rule is subject to change in light of evolving judicial understanding about the effects of the rule outside the confines of the courtroom.<sup>166</sup>

Justice Brennan, joined by Justice Marshall, submitted a lengthy dissent, asserting that the *Leon* decision sounded the death knell for the exclusionary rule.<sup>167</sup> The dissent objected to the majority's assumption that the underlying purpose of the rule is police deterrence.<sup>168</sup> Justice Brennan contended that any deterrence function ascribed to the rule should operate not just against the police, but against the government as a whole.<sup>169</sup> The dissent presupposed a single process in which the evidence-gathering role of the police and the evidence-admitting function of the courts cannot be separated.<sup>170</sup> By admitting unlawfully seized evidence, Justice Brennan contended, the courts become implicated in a single government action prohibited by the fourth amendment.<sup>171</sup> In short, the dissent concluded that the right to be free from the initial invasion of privacy and the right to have illegally seized evidence excluded at trial are coordinate components of the right to be free from unreasonable searches and seizures.<sup>172</sup>

As Justice Brennan adhered to the "unitary" model of prosecution, he rejected the majority's balancing approach whereby the vitality of the rule is linked to its effectiveness as a police deterrent.<sup>173</sup> He asserted that the majority's preoccupation with the "costs" of excluding reliable evidence stems from a refusal to acknowledge that the very function of the fourth amendment is to restrict the investigatory efforts of the government.<sup>174</sup> Justice Brennan contended that by restricting the manner in which searches can be

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 3423 (Blackmun, J., concurring).

<sup>162</sup> *Id.* at 3424 (Blackmun, J., concurring).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 3430 (Brennan, J., dissenting).

<sup>168</sup> *See id.* at 3432-36 (Brennan, J., dissenting).

<sup>169</sup> *Id.*

<sup>170</sup> *See id.*

<sup>171</sup> *Id.* at 3433 (Brennan, J., dissenting).

<sup>172</sup> *Id.* at 3436-38 (Brennan, J., dissenting).

<sup>173</sup> *Id.* at 3436-37 (Brennan, J., dissenting).

<sup>174</sup> *Id.*

conducted, the amendment contemplates that some evidence will be lost.<sup>175</sup> Accordingly, he concluded that it is the fourth amendment, not the exclusionary rule, which exacts the costs bewailed by the majority.<sup>176</sup> Therefore, for Justice Brennan, exclusion of illegally seized evidence was a mandatory measure, not a discretionary judgment contingent on the outcome of a balancing test.

Justice Brennan then stated that, even if he were to accept the Court's balancing approach, he would still disagree with the *Leon* result.<sup>177</sup> He claimed that the "costs" attributed to the rule by the majority have been greatly exaggerated.<sup>178</sup> Indeed, Justice Brennan stated, the costs of the rule, in terms of lost convictions and dropped prosecutions, are quite low.<sup>179</sup> Further, he contended that the majority erred in setting the costs of exclusion in all cases against the deterrent benefit associated only with exclusion in good-faith-reliance situations.<sup>180</sup> The proper calculus, according to Justice Brennan, would set only the costs of exclusion in good-faith-reliance cases against the benefits of exclusion in the same cases.<sup>181</sup> In Brennan's view, the majority's approach of weighing the costs from exclusions as a set, against the benefits which accrue from the subset of exclusions in good-faith-reliance situations compels an inaccurate result.<sup>182</sup>

In addition, Justice Brennan argued that fashioning an exception to the exclusionary rule based on reasonable reliance on a warrant was superfluous in light of the Court's recent decision in *Gates*.<sup>183</sup> In *Gates*, the Court formulated a "totality of circumstances" test whereby the reviewing court merely looks to whether the magistrate had a substantial basis for finding probable cause.<sup>184</sup> Justice Brennan contended that given such a relaxed standard, it is inconceivable that a court could find a lack of probable cause under *Gates*, but nonetheless find that a police officer's reliance on such a warrant was objectively reasonable under *Leon*.<sup>185</sup> According to Justice Brennan, any other construction would confront the Court with the paradox of objectively reasonable reliance on an objectively unreasonable warrant.<sup>186</sup>

Thus Brennan concluded that the *Leon* and *Gates* tests were in effect the same, and intimated that the Court had an ulterior motive for creating the good-faith exception.<sup>187</sup> In Brennan's view, this motive was a desire to cut back on fourth-amendment protections.<sup>188</sup> The ulterior motive and activist stance embodied in the majority's failure to

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<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 3440 (Brennan, J., dissenting).

<sup>177</sup> *Id.* at 3441-42 (Brennan, J., dissenting).

<sup>178</sup> *Id.* Justice Brennan stated that:

[A] 1979 study prepared at the request of Congress by the General Accounting Office reported that only 0.4% of all cases actually declined for prosecution by federal prosecutors were declined primarily because of illegal search problems. Report of the Comptroller General of the United States, Impact of the Exclusionary Rule on Federal Criminal Prosecutions 14 (1979).

*Id.* at 3441 (Brennan, J., dissenting).

<sup>179</sup> *Id.* at 3442 (Brennan, J., dissenting).

<sup>180</sup> *See id.*

<sup>181</sup> *Id.* at 3444 (Brennan, J., dissenting).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 3445 (Brennan, J., dissenting). See *supra* note 43 for a discussion of *Gates*.

<sup>184</sup> 462 U.S. 213 (1983).

<sup>185</sup> *Leon*, 104 S. Ct. at 3445-46 (Brennan, J., dissenting).

<sup>186</sup> *Id.* at 3445 (Brennan, J., dissenting).

<sup>187</sup> *Id.* at 3445-46 (Brennan, J., dissenting).

<sup>188</sup> *Id.* at 3430 (Brennan, J., dissenting).

remand *Leon* under *Gates* was the basis of the fear Justice Brennan expressed that the *Leon* decision may be extended to situations in which there has been no reliance on a warrant.<sup>189</sup> The Justice saw the potential for an extension of the *Leon* exception to situations where police officers, without warrants, conduct searches in good-faith on their own determination of probable cause or exigent circumstances.<sup>190</sup> In short, Justice Brennan saw no limitation on the majority's capacity to "balance away" fourth-amendment protections.<sup>191</sup>

After having attacked the rationale of the *Leon* decision, Justice Brennan discussed the unfortunate consequences which he felt were sure to follow in the wake of the decision.<sup>192</sup> Justice Brennan believed that one consequence of the good-faith exception would be that a magistrate's decision to issue warrants will be effectively insulated from review.<sup>193</sup> Brennan noted that this would result because a police officer's reliance on a warrant will have the effect of forgiving a magistrate's mistaken probable cause determination.<sup>194</sup> Under the result in *Leon*, if a magistrate's decision to issue a warrant is correct, evidence obtained pursuant to that warrant is, of course, admissible.<sup>195</sup> Justice Brennan noted, however, that if the magistrate's decision is incorrect, but the police relied on it in good-faith, the evidence will still be admitted.<sup>196</sup> Moreover, according to Justice Brennan, the *Leon* ruling will inevitably result in a decrease in attention to detail and investigative diligence on the part of the police.<sup>197</sup> In effect, the police will be encouraged to provide only the bare minimum of information on warrant applications.<sup>198</sup> Justice Brennan contended that the police will soon realize that if they obtain a warrant, so long as its issuance was not entirely unreasonable, their conduct pursuant to the warrant would be protected from further review.<sup>199</sup> Justice Brennan believed that these ramifications of the *Leon* decision would have the consequence of weakening the probable cause standard and undermining the integrity of the warrant process.<sup>200</sup>

Turning to the facts of *Leon*, Justice Brennan asserted that because probable cause was admittedly absent, the warrant never should have been issued.<sup>201</sup> Justice Brennan contended that once stripped of the authority of a warrant, the conduct of the police officers in *Leon* was plainly an unconstitutional invasion of the respondents' homes.<sup>202</sup> Therefore, the evidence must be suppressed, according to Justice Brennan, to restore the government to the position it would have occupied had the unconstitutional search not occurred.<sup>203</sup>

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<sup>189</sup> *Id.* at 3446 (Brennan, J., dissenting).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 3444 (Brennan, J., dissenting).

<sup>193</sup> *Id.* at 3444-45 (Brennan, J., dissenting).

<sup>194</sup> *Id.* at 3444 (Brennan, J., dissenting).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 3445 (Brennan, J., dissenting).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 3438 (Brennan, J., dissenting).

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

In his dissenting opinion, Justice Stevens also discerned a paradox in the majority's willingness to find objectively reasonable reliance on objectively unreasonable warrants.<sup>204</sup> Justice Stevens similarly objected to the lack of judicial restraint which he felt was exhibited by the Court in refusing to remand *Leon* to be reconsidered in light of *Gates*.<sup>205</sup> Again like Justice Brennan, Justice Stevens believed that it was likely that probable cause would have been found under the *Gates* rule and that the creation of a good-faith exception could have been avoided.<sup>206</sup> Justice Stevens made clear that he disapproved of the majority's attempt to settle the case on the broadest possible grounds in its eagerness to carve out an exception to the exclusionary rule.<sup>207</sup>

Justice Stevens also disagreed with the absolute deference given to a magistrate's decision to issue a warrant and a police officer's subsequent reliance on that warrant.<sup>208</sup> He noted that up until the *Leon* decision, the fact that a magistrate issued a warrant had not been a guarantee that the ensuing search would be found to be reasonable by a reviewing court.<sup>209</sup> Justice Stevens stated that reviewing courts have always inquired into the propriety of a magistrate's decision to issue a warrant.<sup>210</sup> Justice Stevens further contended that the notion that a police officer's reliance on a warrant excuses its invalidity is one that the framers of the fourth amendment would have vehemently rejected<sup>211</sup> because, according to Justice Stevens, the amendment was enacted with the primary objective of preventing the improper issuance of warrants.<sup>212</sup> Thus, in his opinion, the Court's decision in *Leon* was the product of "constitutional amnesia."<sup>213</sup>

Justice Stevens made clear that while he agreed with earlier cases where the Court refused to apply the exclusionary rule to "collateral contexts in which its marginal efficacy is questionable," the *Leon* decision was of a different order.<sup>214</sup> In *Leon*, according to Justice Stevens, the Court sanctioned the use of illegally seized evidence in the prosecution's case-in-chief.<sup>215</sup> He expressed amazement that for the first time, the Court held that although the Constitution has been violated, no remedy need be provided.<sup>216</sup> In sum, Justice Stevens disapproved of the majority's conclusion that a search undertaken without probable cause could nevertheless be deemed reasonable.<sup>217</sup>

### B. *The Reasoning of the Supreme Court in Massachusetts v. Sheppard*

Having decided in *Leon* that the exclusionary rule should not be applied when officers conducting a search acted in objectively reasonable reliance on a warrant, the

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<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 3447-48 (Stevens, J., dissenting).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 3451-53 (Stevens, J., dissenting).

<sup>209</sup> *Id.* at 3451 (Stevens, J., dissenting).

<sup>210</sup> *Id.* at 3451-52 (Stevens, J., dissenting).

<sup>211</sup> *Id.* at 3452 (Stevens, J., dissenting).

<sup>212</sup> *Id.* at 3452-53 (Stevens, J., dissenting).

<sup>213</sup> *Id.* at 3453 (Stevens, J., dissenting).

<sup>214</sup> *Id.* at 3456 (Stevens, J., dissenting).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* He noted that in all cases in which the good-faith exception would operate, there would be immunity from civil damages. *Id.* at 3456 n.35 (Stevens, J., dissenting).

<sup>217</sup> *See id.* at 3450 (Stevens, J., dissenting).

Court went on to measure the search in *Sheppard* against this standard.<sup>218</sup> The majority stated that there was no question that the officers in *Sheppard* believed in good-faith that the warrant was valid.<sup>219</sup> The only question to be addressed, the Court asserted, was whether there was an objectively reasonable basis for this belief.<sup>220</sup> The majority, through Justice White, concluded that there was.<sup>221</sup>

The Court noted that the officers in *Sheppard* took every step possible to comply with the law and refused to rule that an officer is required to disbelieve a judge who assures the officer that he possesses a valid warrant.<sup>222</sup> Repeating the assumption that the exclusionary rule is designed to deter police rather than punish judges' errors, and finding that the deterrent function would not be served by exclusion, the Court declined to apply the exclusionary rule to the facts of *Sheppard*.<sup>223</sup>

Justice Stevens agreed with the majority that the evidence obtained pursuant to the search warrant in *Sheppard* should be admitted.<sup>224</sup> He did not base his conclusion on the good-faith exception, however, but on his belief that the fourth amendment was not violated at all in *Sheppard*.<sup>225</sup> Justice Stevens believed that the police in that case got proper authorization from a detached and neutral magistrate.<sup>226</sup>

Turning to the Massachusetts Supreme Judicial Court's finding that the warrant failed to meet the particularity requirement, Justice Stevens contended that the purpose of the requirement is to prevent general searches.<sup>227</sup> He asserted that since there was no danger of a general search on the *Sheppard* facts, the requirement should not be invoked to suppress the seized evidence.<sup>228</sup> The reason no such danger existed in this case, Justice Stevens explained, was that the affidavit supporting the warrant application particularly and accurately identified the things to be seized.<sup>229</sup> According to Justice Stevens, both the police officers and the judge were fully aware of the contents of the affidavit.<sup>230</sup> In short, Justice Stevens believed, there was no "occasion or opportunity for officers to rummage at large."<sup>231</sup> Therefore, Justice Stevens concluded that even if there was a technical violation of the particularity requirement, the search was still "eminently reasonable."<sup>232</sup>

Justice Brennan, again joined by Justice Marshall, dissented from the *Sheppard* decision.<sup>233</sup> Justice Brennan viewed the warrant's failure to describe with particularity

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<sup>218</sup> *Sheppard*, 104 S. Ct. at 3428. It will be remembered that in *Sheppard*, unlike *Leon*, probable cause clearly existed. The warrant, however, was defective on its face because it authorized a search for controlled substances. Though the issuing magistrate told the applying officer that he would make the necessary changes, the defect was not cured. See *supra* notes 61-71 and accompanying text.

<sup>219</sup> *Sheppard*, 104 S. Ct. at 3428.

<sup>220</sup> *Id.* at 3428-29.

<sup>221</sup> *Id.* at 3429.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 3429-30.

<sup>224</sup> *Id.* at 3448-50 (Stevens, J., concurring).

<sup>225</sup> *Id.* at 3449-50 (Stevens, J., concurring).

<sup>226</sup> *Id.* at 3450 (Stevens, J., concurring).

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 3448-49 (Stevens, J., concurring).

<sup>229</sup> *Id.* at 3449 (Stevens, J., concurring).

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 3450 (Stevens, J., concurring).

<sup>233</sup> *Id.* at 3439 (Brennan, J., dissenting).

the things to be seized as determinative.<sup>234</sup> In his opinion, this violation of the particularity requirement of the fourth amendment mandated the suppression of the evidence.<sup>235</sup> According to Justice Brennan, there can be no such thing as a technical violation of the Constitution which can go without redress.<sup>236</sup> Justice Brennan contended that the fact that the officers only searched for the things mentioned in the affidavit was merely fortuitous and should not be used to support the majority's argument.<sup>237</sup>

### III. LEON AND SHEPPARD: SQUEEZING THE LIFE BLOOD OUT OF THE FOURTH AMENDMENT

#### A. *Exclusionary Rule Restrains Entire Government, Not Just the Police*

Since its adoption by the Supreme Court in the 1914 case of *Weeks v. United States*, the exclusionary rule has dictated that evidence obtained in violation of the fourth amendment may not be used by the government in prosecuting individuals whose constitutional rights have been violated. In the *Leon* and *Sheppard* decisions however, the Supreme Court, through its use of the fragmentary view of the exclusionary rule, held illegally seized evidence to be admissible in the prosecution's case-in-chief. This section of the casenote analyzes the Court's decisions in these cases against the historical background of the exclusionary rule. First, this section will examine the Court's assumption in *Leon* that the sole purpose of the exclusionary rule is to deter police from conducting illegal searches. This section will then criticize the *Leon* majority's use of cost-benefit analysis in determining whether illegally seized evidence should be admissible. Next, this section will contend that the *Sheppard* Court misapplied the principle enunciated in *Leon* in further derogation of fourth amendment protections. Finally, this section will conclude with a brief discussion of the deleterious effect which the *Leon* and *Sheppard* cases may have on future fourth-amendment jurisprudence.

The majority's argument in *Leon* is grounded in the assumption that the exclusionary rule exists only to deter lawless police behavior.<sup>238</sup> Yet, if the purpose of the rule is in fact deterrence, it is deterrence of the whole government, not just the police, which is contemplated. The proper view of the rule is that it restrains a monolithic prosecution network.<sup>239</sup> This "unitary" concept of prosecution<sup>240</sup> is supported by both precedent and logic.<sup>241</sup>

That the exclusionary rule was not originally intended merely to deter police is evident from the fact that in the *Boyd* case, where the rule made its first appearance, no police conduct, let alone misconduct, was involved.<sup>242</sup> The Court's adherence to the unitary model remained undisturbed in *Weeks*,<sup>243</sup> where the Court expressly recognized

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<sup>234</sup> *Id.* at 3439-40 (Brennan, J., dissenting).

<sup>235</sup> *Id.* at 3440 (Brennan, J., dissenting).

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Leon*, 104 S. Ct. at 3412.

<sup>239</sup> *See id.* at 3432 (Brennan, J., dissenting).

<sup>240</sup> *See supra* notes 11-12 for a discussion of the fragmentary and unitary models of prosecution.

<sup>241</sup> *See Weeks*, 232 U.S. at 392.

<sup>242</sup> *Boyd*, 116 U.S. at 619-20. At issue in *Boyd* were subpoenas issued pursuant to an act of Congress which gave the claimants the option of producing evidence or allowing allegations against them to be taken as true. *Id.* *See also* Wasserstrom, *supra* note 6, at 394.

<sup>243</sup> 232 U.S. 383 (1914).

that the commands of the fourth amendment are directed to both the courts and the executive.<sup>244</sup> The *Weeks* Court noted that the duty of giving effect to the fourth amendment "is obligatory upon all entrusted under our Federal system with the enforcement of laws."<sup>245</sup>

The Court in *Weeks* focused on maintaining the integrity of the process of "bringing proof to the aid of government."<sup>246</sup> In such a unitary prosecution structure "no distinction can be made between the Government as prosecutor and the Government as judge."<sup>247</sup> In the 1960 *Elkins* case, the Court went so far as to say that a conviction resting on evidence obtained in an illegal search makes courts accomplices in disobedience of the law.<sup>248</sup> This concept exposes the impropriety of *Leon* by illustrating that when a court is presented with illegally seized evidence, application of the exclusionary remedy is not discretionary, but mandatory if the court is to avoid committing an independent violation of the fourth amendment.<sup>249</sup>

Wholly apart from the language in the early cases which was consistent with the unitary concept, the spirit of the cases in which the exclusionary rule was born would seem not to countenance the *Leon* result. The Court in *Weeks*, *Elkins* and *Mapp* evinced a desire to prevent admission of the fruits of an illegal search no matter which branch of the government was the source of the violation.<sup>250</sup> The emphasis was on turning away tainted evidence at the courthouse steps. For example, in *Mapp*, the Court was gratified to "close the only courtroom door remaining open to evidence secured by official lawlessness."<sup>251</sup> It would seem clear that cases such as *Mapp* and *Elkins*, in which the Court labored to end vertical (state/federal) circumvention of the exclusionary rule, could not tolerate horizontal (judicial/executive) circumvention by unequal enforcement.<sup>252</sup> The *Elkins* majority noted that no distinction can logically be drawn between evidence obtained in violation of the fourth amendment and that obtained in violation of the

<sup>244</sup> *Id.* at 391-92.

<sup>245</sup> *Id.* at 392. "The tendency of those who execute the criminal laws of the country to obtain convictions by means of unlawful seizures . . . should find no sanction in the judgments of the courts . . . ." *Id.*

<sup>246</sup> *Id.* at 393.

<sup>247</sup> *Elkins*, 364 U.S. at 222-23 (quoting *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting)). See also *Leon*, 104 S. Ct. at 3432 (Brennan, J., dissenting).

<sup>248</sup> *Elkins*, 364 U.S. at 223 (citing *McNabb v. United States*, 318 U.S. 332, 345 (1943)). See also *Dodge v. United States*, 272 U.S. 530, 532 (1926). "If the search and seizure [is] unlawful as invading personal rights secured by the Constitution, those rights would be infringed yet further if the evidence were allowed to be used." *Id.*

<sup>249</sup> This original understanding of the exclusionary rule stands in stark contrast to the *Calandra* majority's assertion that the constitutional rights of a victim of an illegal search are completely violated by the police intrusion and therefore a court's admission of the evidence "works no new Fourth Amendment wrong." *Calandra*, 414 U.S. at 354.

<sup>250</sup> See, e.g., *Weeks*, 232 U.S. at 391-93.

<sup>251</sup> *Mapp*, 367 U.S. at 654-55.

<sup>252</sup> See Brief for Respondents Sanchez, Stewart and Del Castillo at 24, *United States v. Leon*, 104 S. Ct. 3405 (1984).

It is a distinction without substance to attempt to insulate courts from the unlawful activity of the police, since admission of the unconstitutionally-seized evidence makes the court a participant in the illegality. Both the police who seized the evidence and the court which allowed its use are part of the "government's approval of systemic lawlessness."

*Id.* (citations omitted).

fourteenth as "the Constitution is flouted in either case."<sup>253</sup> It would be no less illogical to prohibit police from violating the fourth amendment but not to prohibit judges. Just as it makes no difference to the victim whether his constitutional right has been invaded by a federal agent or a state official,<sup>254</sup> it would not matter to him whether his rights were violated by a policeman or a judge.<sup>255</sup>

Justice Brennan put the matter in almost syllogistic form.<sup>256</sup> He noted that seizures are executed principally to secure evidence.<sup>257</sup> The utility of such evidence in a criminal prosecution arises ultimately in the context of the courts.<sup>258</sup> He therefore concluded that the courts cannot be absolved of responsibility for the means by which evidence is obtained.<sup>259</sup> He was of the opinion that the evidence-gathering role of the police is inextricably linked to the evidence-admitting role of judges and that "an individual's fourth amendment rights may be undermined as completely by one as by the other."<sup>260</sup>

This unitary perspective underscores the folly of allowing a police officer's reliance on a defective warrant to have the practical effect of excusing the magistrate's error in issuing it. Clearly an error of constitutional dimensions by one sector of government cannot be rendered innocuous by the fact that it was not detected by another sector. The notion that reliance on a warrant lacking probable cause would excuse the defect would have been anathema to the founding fathers.<sup>261</sup>

Thus the majority's assumption that the sole purpose of the exclusionary rule is police deterrence is unfounded. The Court, however, started from this premise to establish that the decision to apply the exclusionary remedy is a discretionary one. This decision in turn, is to hinge on the weighing of the costs and benefits of exclusion in a given instance. The Court's use of the weighing approach, however, raises several problems.

#### B. *Flaws in the Majority's Use of Cost-Benefit Analysis*

If the unitary perspective is indeed the proper view, the Court's attempt to link the applicability of the exclusionary rule to its effectiveness as a police deterrent would seem improper. Yet, even if one accepts the Court's methodology of balancing social costs against police deterrence benefits, the Court's use of this analysis in *Leon* is still incorrect.

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<sup>253</sup> *Elkins*, 364 U.S. at 215.

<sup>254</sup> *Id.*

<sup>255</sup> See *Leon*, 104 S. Ct. at 3433 (Brennan, J., dissenting). Justice Brennan stated:

Certainly nothing in the language or history of the Fourth Amendment suggests that a recognition of this evidentiary link between the police and the courts was meant to be foreclosed. It is difficult to give any meaning at all to the limitations imposed by the Amendment if they are read to proscribe only certain conduct by the police but to allow other agents of the same government to take advantage of evidence secured by the police in violation of its requirements. The Amendment therefore must be read to condemn not only the initial unconstitutional invasion of privacy — which is done, after all, for the purpose of securing evidence — but also the subsequent use of any evidence so obtained.

*Id.* (citations omitted).

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 3435 (Brennan, J., dissenting).

<sup>261</sup> See *id.* at 3452–53 (Stevens, J., dissenting).



The Court's application of cost-benefit analysis was flawed because the data which the Court used were inaccurate and because such data were misapplied.<sup>262</sup>

The first problem that arises with the majority's use of cost-benefit analysis is the accuracy of the data which the court used in its police-deterrence formula. The data are hopelessly ambiguous<sup>263</sup> because while the costs of exclusion are highly visible, the deterrent benefits are far more conjectural.<sup>264</sup> There appears to be a significant deterrent effect on police conduct,<sup>265</sup> even in good-faith situations,<sup>266</sup> but when that benefit is present it defies documentation.<sup>267</sup> When the exclusionary rule does deter police it produces a non-event, namely the non-conduct of an illegal search.<sup>268</sup> As it is "never easy to prove a negative" it is hardly likely that conclusive data could ever be assembled.<sup>269</sup>

On the cost side of the equation, the data that are available tend to support Justice Brennan's assertion that the majority exaggerated the costs of the rule.<sup>270</sup> In fact, rarely are cases dropped for prosecution or are defendants acquitted due to exclusionary rule problems.<sup>271</sup> Justice Brennan cited a 1979 study to the effect that only 0.2% of all felony arrests are declined for prosecution due to the potential of exclusion of evidence.<sup>272</sup> Brennan further contended that only 0.7% of cases that go to trial end in a dismissal or acquittal after evidence is excluded.<sup>273</sup> He noted that these are figures for the cost of exclusion in all cases and stated that the cost of exclusion in the narrower category of cases where police make objectively reasonable mistakes is necessarily even smaller.<sup>274</sup> In

<sup>262</sup> *Id.* at 3440-41 (Stevens, J., dissenting).

<sup>263</sup> See *Leon*, 104 S. Ct. at 3437 (Brennan, J., dissenting); *United States v. Karathanos*, 531 F.2d 26, 33 n.7 (2d Cir. 1976).

<sup>264</sup> See Kamisar, *supra* note 6, at 621; LaFave, *supra* note 6, at 318-19.

<sup>265</sup> See Brief for Respondents Sanchez, Stewart and Del Castillo at 52, *United States v. Leon*, 104 S. Ct. 3405 (1984):

Despite the unavailability of empirical data, experience with the exclusionary rule demonstrates that it does have a deterrent effect on police conduct. The dramatic increase in the use of search warrants in the post-*Mapp* years indicates that the Court's decision impacted on police practices. Furthermore, the rule has caused police departments to increase training of their officers to effectuate compliance with the Court's Fourth Amendment decisions. Moreover, the rule has also encouraged working relationships between police and prosecutors to ensure that evidence is obtained in ways not resulting in its suppression.

*Id.* (citations omitted). See also *Leon*, 104 S. Ct. at 3443 n.12 (Brennan, J., dissenting).

<sup>266</sup> See Wasserstrom, *supra* note 6, at 396:

Justice White contends that suppression of evidence where an invalid warrant has been obtained "cannot be expected to deter future reliance on such warrants." But of course it can. If the police know that evidence may be suppressed despite the issuance of a warrant, they will try harder to make sure that they have established probable cause before they seek a warrant.

See also *Leon*, 104 S. Ct. at 3444 (Brennan, J., dissenting).

<sup>267</sup> See Kamisar, *supra* note 6, at 621; LaFave, *supra* note 6, at 318-19.

<sup>268</sup> See Kamisar, *supra* note 6, at 621.

<sup>269</sup> *Elkins*, 364 U.S. at 218.

<sup>270</sup> *Leon*, 104 S. Ct. at 3430, 3441 (Brennan, J., dissenting).

<sup>271</sup> See *id.* at 3441-42 (Brennan, J., dissenting).

<sup>272</sup> *Id.* at 3441-42 (Brennan, J., dissenting) (citing Report of the Comptroller, *supra* note 178, at 8, 10).

<sup>273</sup> *Leon*, 104 S. Ct. at 3441-42 n.11 (Brennan, J., dissenting) (citing Report of the Comptroller, *supra* note 178, at 8, 10).

<sup>274</sup> *Leon*, 104 S. Ct. at 3441-42 (Brennan, J., dissenting).

short, the empirical evidence which is available shows that the costs of the rule are not as substantial as the majority contends, and the deterrent benefits are exceedingly difficult to determine.<sup>275</sup>

Therefore, the majority's tactic of requiring that deterrent benefits outweigh costs before the exclusionary remedy will be applied can be seen as a thinly veiled method of reaching a predetermined result.<sup>276</sup> As nothing can be proven conclusively either way, the majority's assignment of the burden of proof as to deterrent effect becomes outcome determinative.<sup>277</sup> Assuming, as seems reasonable, that the goal of the Burger Court is to obtain more convictions, the ostensibly neutral cost-benefit test is exposed as a policy-making tool.

Another and perhaps more basic problem with the Court's use of cost-benefit analysis is that its invocation of *Calandra* and its progeny to justify the admission of evidence in the prosecution's case-in-chief was improper because those cases assumed that illegally seized evidence would not be so employed.<sup>278</sup> The *Leon* Court grounded its balancing approach on post-*Mapp* cases where the Court merely refused to extend the rule to areas collateral to proof of guilt at a criminal trial.<sup>279</sup> These prior cases dealt with issues such as the admission of illegally seized evidence in civil trials<sup>280</sup> and the limitation of standing to invoke the exclusionary rule.<sup>281</sup> In these earlier decisions where the Court used the balancing approach to avoid suppression in collateral contexts, the Court presupposed that the exclusionary rule would apply with full force to the case-in-chief.<sup>282</sup> The assurance of a remedy which gives vitality to a right otherwise of no value was prerequisite to the Court's accommodating social costs by manipulating the scope of the rule in areas peripheral to the case-in-chief.

For example, in *Calandra* the Court decided that exclusion in the grand jury context would not be warranted because "the incentive to disregard the requirement of the fourth amendment solely to obtain an indictment from a Grand Jury is substantially negated by the subsequent inadmissibility of the evidence in the criminal prosecution."<sup>283</sup> Thus these cases cannot be used to justify the *Leon* exception because they explicitly contemplated the exclusion of illegally seized evidence in the case-in-chief.<sup>284</sup> Though

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<sup>275</sup> See *id.* at 3437 (Brennan, J., dissenting). Thus, the majority's tactic of imposing a burden of proof as to the deterrent effect of the rule is outcome determinative.

<sup>276</sup> See Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329, 332-33 (1973). As Professor Canon has noted, the assignment of the burden to prove the deterrence capability of the exclusionary rule "is little more than the adoption of an old 'debater's trick' where when nothing can be proven either way, the first debater vigorously asserts that it is incumbent upon the second debater to prove his arguments." Canon, *Ideology and Reality in the Debate Over the Exclusionary Rule: A Conservative Argument for its Retention*, 23 S. TEX. L.J. 559, 564 (1982). See Brief for Respondents Sanchez, Stewart and Del Castillo at 51, *United States v. Leon*, 104 S. Ct. 3405 (1984).

<sup>277</sup> See Brief for Respondents Sanchez, Stewart and Del Castillo at 51, *United States v. Leon*, 104 S. Ct. 3405 (1984).

<sup>278</sup> See *id.* at 20-21.

<sup>279</sup> *Id.* at 20.

<sup>280</sup> *United States v. Janis*, 428 U.S. 433, 454 (1976).

<sup>281</sup> *Rakas v. Illinois*, 439 U.S. 128, 133 (1978).

<sup>282</sup> See Brief for Respondents Sanchez, Stewart and Del Castillo at 20, *United States v. Leon*, 104 S. Ct. 3405 (1984).

<sup>283</sup> *Calandra*, 414 U.S. at 351. See also *Janis*, 428 U.S. at 454.

<sup>284</sup> See Brief for Respondents Sanchez, Stewart and Del Castillo at 21, *United States v. Leon*, 104 S. Ct. 3405.

the *Leon* Court relies heavily on these cases, the "good-faith exception" represents a quantum leap in fourth-amendment jurisprudence rather than merely a logical extension of precedent. In short, the Court depended on cases which were premised on a foundation that the *Leon* decision erodes, namely the assumption that the exclusionary rule would be applied without exception to the case-in-chief.

### C. Consequences of the *Leon* and *Sheppard* Decisions

Quite apart from their logical shortcomings, the *Leon* and *Sheppard* decisions will have a variety of adverse consequences on fourth amendment jurisprudence. The likely effects of the *Leon* and *Sheppard* rulings give insight to the Court's motivation in rendering the decisions. The motivation which pervades the opinions is the majority's desire to reduce the substantive protection afforded by the fourth amendment by denying a remedy even if there has been a constitutional violation.

One untoward consequence of the good-faith exception is that it will serve to insulate magistrates from effective review of their decisions to issue warrants.<sup>285</sup> The *Leon* Court sent an unequivocal message that magistrates need not take much care when reviewing warrant applications as their mistakes will have little or no consequence.<sup>286</sup> If the magistrate's decision to issue a warrant is correct the evidence will of course be admitted. Yet if the decision is incorrect but police relied in good-faith on the warrant, then the evidence will still be admitted.<sup>287</sup> Attention to detail will necessarily dwindle as the focus of review is shifted from the decision to issue a warrant to a police officer's reliance on it.<sup>288</sup> In short, apart from a professional desire to comply with the fourth amendment, there is "no incentive for a magistrate to refrain from repeating the same mistake in the future or from granting any colorable request for a search warrant."<sup>289</sup>

This creation of a "super magistrate" beyond review is counter to the notion of judicial deterrence being as essential to the safeguarding of the fourth amendment as police deterrence.<sup>290</sup> Although a magistrate's probable-cause determination should be afforded considerable deference, the complete insulation from subsequent review created by *Leon* is unwarranted.<sup>291</sup> As recently as *Illinois v. Gates*,<sup>292</sup> Justice Rehnquist wrote

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<sup>285</sup> See *Leon*, 104 S. Ct. at 3444 (Brennan, J., dissenting).

<sup>286</sup> *Id.*

<sup>287</sup> *Id.* See *United States v. Karathanos*, 531 F.2d 26 (2d Cir. 1976), where the Second Circuit refused to employ the good-faith exception. The Court noted that the exclusionary rule has the effect of:

making [magistrates] aware that their decision to issue a search warrant is a matter of importance not only in regard to the constitutional rights of the person to be searched, but also in regard to the success of any subsequent criminal prosecution, may well induce them to give search warrant applications the scrutiny which a proper regard for the Fourth Amendment requires.

*Id.* at 33.

<sup>288</sup> *Leon*, 104 S. Ct. at 3444 (Brennan, J., dissenting).

<sup>289</sup> See *Stewart*, *supra* note 6, at 1403.

<sup>290</sup> See *Weeks*, 232 U.S. at 391-93. "[T]he Fourth Amendment was interpreted to secure the citizen in person and property against unlawful invasion of the sanctity of his home by officers of the law acting under legislative or judicial sanction." *Id.* at 394. See also Brief for Respondents Sánchez, Stewart and Del Castillo at 29, *United States v. Leon*, 104 S. Ct. 3405 (1984).

<sup>291</sup> See Brief for Respondents Sánchez, Stewart and Del Castillo at 30, *United States v. Leon*, 104 S. Ct. 3405 (1984).

<sup>292</sup> 462 U.S. 213 (1983).

for the majority that the "courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued."<sup>293</sup> This directive seems to have been forgotten by Justice Rehnquist and the rest of the *Leon* majority.

This lack of effective review is even more problematic than it would first appear, due to the less than rigorous requirements for becoming a magistrate. In *Shadwick v. City of Tampa*,<sup>294</sup> the Court ruled that civil servants with no legal training, appointed by a city clerk, can become magistrates and issue warrants.<sup>295</sup> A recent study found that approximately 14,000 non-attorneys are acting as judges in the United States.<sup>296</sup> Some states merely require a judge to be a high school graduate, while others require a judge to be "literate."<sup>297</sup> Most of these judges are authorized to issue both arrest and search warrants.<sup>298</sup> Thus, the *Leon* decision greatly increased the deference to and effect of a magistrate's discretion. In a great number of instances, however, this discretion is not exercised in an informed manner because many magistrates have no legal training. Giving conclusive effect to the decisions of non-attorney magistrates to issue warrants can only serve to weaken the protection against conviction by use of illegally seized evidence.

The problems engendered by judicial deference to magistrates' discretion where no such deference is warranted will be exacerbated by "magistrate shopping."<sup>299</sup> Since admissibility of evidence will turn, not on the existence of probable cause, but on whether the police found someone willing to sign a warrant, magistrate shopping will increase dramatically.<sup>300</sup> Since, under *Leon* obtaining the signature of a magistrate will be all but conclusive as to the validity of the warrant, it will behoove police to go to a lenient magistrate.<sup>301</sup> This is in contrast to the present system of universal application of the exclusionary rule, where officers benefit from seeking warrants from demanding mag-

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<sup>293</sup> *Id.* at 239.

<sup>294</sup> 407 U.S. 345 (1972).

<sup>295</sup> *Id.* at 352-54. The Court noted that "[I]t has never been held that only a lawyer or judge could grant a warrant regardless of the court system or type of warrant involved." *Id.* at 348. The Court considered only the issuance of a warrant for violation of a city ordinance, noting that the clerk was not authorized to issue search warrants. *Id.* at 347. But in practice judicial systems have granted authority far beyond that in *Shadwick*. See Brief for Respondent Leon at 11, *United States v. Leon*, 104 S. Ct. 3405 (1984). For example, in *State v. Upchurch*, 267 N.C. 417, 148 S.E.2d 259 (1966), a search warrant was issued by an assistant clerk of the recorder's court of Durham County, North Carolina. The state Supreme Court found the clerk did not have "the slightest comprehension as to what her legal duties and responsibilities [were] in connection with the issuance of search warrants." *Id.* at 419, 148 S.E.2d at 61.

<sup>296</sup> Brief for Respondent Leon at 10-12, *United States v. Leon*, 104 S. Ct. 3405 (1984) (citing L. SILBERMAN, *NON ATTORNEY JUSTICE IN THE UNITED STATES: AN EMPIRICAL STUDY*, 25 (1979)).

<sup>297</sup> *Id.* at 11-12 (citing L. SILBERMAN, *NON ATTORNEY JUSTICE IN THE UNITED STATES: AN EMPIRICAL STUDY*, at 25).

<sup>298</sup> *Id.*

<sup>299</sup> See *id.* at 56; Brief for Respondents Sanchez, Stewart and Del Castillo at 25, *United States v. Leon*, 104 S. Ct. 3405 (1984).

<sup>300</sup> Police already shop for the most lenient magistrates for presentation of their warrant applications. Brief for Respondents Sanchez, Stewart and Del Castillo at 25 n.12, *United States v. Leon*, 104 S. Ct. 3405 (1984); see also Brief for Respondent Leon at 22, *United States v. Leon*, 104 S. Ct. 3405 (1984).

<sup>301</sup> See Brief for Respondent Leon at 56, *United States v. Leon*, 104 S. Ct. 3405 (1984); Brief for Respondents Sanchez, Stewart and Del Castillo at 25, *United States v. Leon*, 104 S. Ct. 3405 (1984).

istrates.<sup>302</sup> In the post-*Leon* era the requirements for a warrant will become whatever it takes to get a signature from the most lenient magistrate.<sup>303</sup> The premium which *Leon* puts on reliance and the insulation of magistrates from review will serve to perpetuate this state of affairs.

Perhaps the most compelling criticism of the *Leon* decision is its dangerous potential to compromise the probable cause standard.<sup>304</sup> In *Gates* the Court ruled that "the task of the issuing magistrate is simply to make a practical common sense decision whether, given all of the circumstances . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place."<sup>305</sup> Moreover, reviewing courts only look to whether the magistrate had a "substantial basis" for concluding that probable cause existed.<sup>306</sup> Essentially the *Leon* Court is proposing that yet another layer of deference is to be added to the lenient *Gates* standard.<sup>307</sup> Evidence obtained pursuant to a warrant that could not meet the lenient requirements of *Gates* may still find its way into court through the *Leon* exception. The *Leon* decision would thus result in a "double dilution"<sup>308</sup> of the fourth-amendment probable-cause standard.<sup>309</sup>

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<sup>302</sup> See *Karathanos*, 531 F.2d at 34.

If a magistrate's issuance of a warrant were to be, as the government would have it, an all but conclusive determination of the validity of the search and of the admissibility of the evidence seized thereby, police officers might have a substantial incentive to submit their warrant applications to the least demanding magistrates, since once the warrant was issued, it would be exceedingly difficult later to exclude any evidence seized in the resulting search even if the warrant was issued without probable cause . . . . For practical purposes, therefore, the standard of probable cause might be diluted to that required by the least demanding official authorized to issue warrants, even if this fell well below what the Fourth Amendment required.

*Id.*

<sup>303</sup> The existence of "rubber stamp" magistrates has long been acknowledged. In a recent study, it was revealed that the magistrate who received the most warrant applications in one city had rejected only one search warrant application in fifteen years as a judge. See Brief for Respondent *Leon* at 18, *United States v. Leon*, 104 S. Ct. 3405 (1984). The number of "rubber stamp" magistrates may not be large but they can have a significant impact. See *Connelly v. Georgia*, 429 U.S. 245 (1977). There, the Court held that a justice of the peace who issued arrest and search warrants under a statute providing payment of a fee to the justice of five dollars for each warrant issued and nothing for each warrant refused was not a neutral and detached magistrate under the Fourth Amendment. The justice had testified that during a period of several years he had issued about 10,000 warrants. *Id.* at 246-51.

<sup>304</sup> See Brief for Respondents *Sanchez, Stewart and Del Castillo* at 35-42, *United States v. Leon*, 104 S. Ct. 3405 (1984).

<sup>305</sup> 462 U.S. 213, 238 (1983).

<sup>306</sup> *Id.*

<sup>307</sup> See Brief for Respondents *Sanchez, Stewart and Del Castillo* at 37 n.23, *United States v. Leon*, 104 S. Ct. 3405 (1984); *Wasserstrom*, *supra* note 6, at 397. Under *Gates*, the reviewing court must uphold a warrant if, "in the totality of the circumstances," a "substantial basis" exists for the magistrate's conclusion that there was a "fair probability" that the items to be seized would be found in the places to be searched. *Gates*, 462 U.S. at 238-39. Another layer of deference, in the form of a good faith exception for warrants found invalid even under these extraordinarily lax standards, would surely be laying it on a bit thick. Brief for Respondents *Sanchez, Stewart, and Del Castillo* at 37 n.23, *United States v. Leon*, 104 S. Ct. 3405 (1984) (citations omitted).

<sup>308</sup> Brief for Respondents *Sanchez, Stewart and Del Castillo* at 36, *United States v. Leon*, 104 S. Ct. 3405 (1984).

<sup>309</sup> *Id.*

In the wake of *Leon*, warrants will not even require a "substantial basis" or a "fair probability" that evidence can be found in the place to be searched.<sup>310</sup> Rather, the determinative factor will become whether a police officer could reasonably have believed that a judge had a "substantial basis" for finding probable cause.<sup>311</sup> In the end, *Leon* will transform probable cause into whatever appears reasonable to a police officer.<sup>312</sup> This situation will pervert the notion that a neutral and detached magistrate, rather than an interested police officer, is supposed to make probable-cause determinations.<sup>313</sup>

The prospect of a watering down of the probable-cause standard is perfectly consistent with the Burger Court's objective of avoiding the loss of convictions on fourth-amendment grounds. The Court could have achieved this goal either by weakening the *Gates* probable-cause standard, or by narrowing the scope of the exclusionary rule. The majority chose the less controversial route of eviscerating what it termed a discretionary rule rather than conducting a direct attack on the explicit constitutional requirement of probable cause. The end result, namely more convictions, is of course the same. This helps to explain the majority's refusal to remand *Leon* under *Gates*, as the Court opted to weaken substantive fourth amendment protections by narrowing the exclusionary rule with the secondary but inevitable result of diluting the probable cause requirement. In short, the *Leon* majority circumvented the text of the fourth amendment and undermined the probable-cause component of the fourth amendment right by the simple expedient of denying a remedy. The distinction between directly attacking a textual right and denying a remedy is specious, however, because a right without a remedy for its violation is form lacking substance.

Of course, the question of whether a fourth-amendment violation has in fact occurred may well become moot as *Leon* goes a long way toward removing the law of search and seizure from constitutional discourse. Despite the majority's claim that the good-faith exception will not preclude review of the constitutionality of searches,<sup>314</sup> the more realistic view is that *Leon* will stop the development of the amendment "dead in its tracks."<sup>315</sup> It is unlikely that when a case can be settled on the narrower ground of the good-faith exception that courts would go on to render merely advisory opinions over whether the fourth amendment had been violated.<sup>316</sup> Though the Court insists that defendants who seek to exclude evidence present live controversies and that the fourth amendment question could be addressed first,<sup>317</sup> practicality and precedent counsel otherwise. It seems clear that the cases and controversies requirement of Article III, section 2 would prohibit a court from deciding the constitutional question if it had deemed evidence admissible under the *Leon* rule.<sup>318</sup> For example, in *Bowen v. United*

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<sup>310</sup> See Brief for Respondent Leon at 54-56, *United States v. Leon*, 104 S. Ct. 3405 (1984).

<sup>311</sup> *Id.* at 55.

<sup>312</sup> *Id.*

<sup>313</sup> See *Johnson v. United States*, 333 U.S. 10, 13-14 (1948). The point of the fourth amendment, which often is not grasped by zealous officers, is not that it denies law enforcement of the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. *Id.*

<sup>314</sup> *Leon*, 104 S. Ct. at 3422-23.

<sup>315</sup> *United States v. Peltier*, 422 U.S. 531, 554 (1975) (Brennan, J., dissenting).

<sup>316</sup> Brief for Respondent Leon at 26, *United States v. Leon*, 104 S. Ct. 3405 (1984).

<sup>317</sup> *Leon*, 104 S. Ct. at 3422-23.

<sup>318</sup> Brief for Respondent Leon at 26, *United States v. Leon*, 104 S. Ct. 3405 (1984).

*States*,<sup>319</sup> the Supreme Court cautioned federal district and appellate courts against deciding fourth amendment issues when the retroactivity question resolved the case.<sup>320</sup> In any case, such a procedure would flout the jurisprudential practice of avoiding unnecessary constitutional decisions.<sup>321</sup>

From a practical standpoint, federal courts with overloaded dockets cannot be expected to resolve complex fourth-amendment issues when the evidence is admissible in any event.<sup>322</sup> That this will be the case is shown by the prelude to *Leon*, *United States v. Williams*.<sup>323</sup> In *Williams*, thirteen judges considered it unnecessary to determine if the arrest was illegal since "evidence is not to be suppressed under the exclusionary rule where it is discovered by officers in the course of actions taken in good-faith."<sup>324</sup> Again, one must look no further than the *Sheppard* decision to see that the potential for stagnation of the fourth amendment will be realized. In *Sheppard*, the Court refused to decide the merits of the fourth-amendment question, dismissing it as a "fact-bound issue of little importance."<sup>325</sup> The *Sheppard* decision is an example of the perfectly logical step of deferring the fourth amendment issue until after it is determined whether evidence will be admitted under the good-faith exception. It is obvious that in all such cases the fourth-amendment question will similarly be "fact-bound" and "of little importance." Despite the Supreme Court's assurances, it seems improbable that courts with crowded dockets will find the time to field hypothetical constitutional questions.

In summary, the following adverse consequences from the *Leon* decision are foreseeable. In making reliance on a warrant the crucial determinant of the admissibility of evidence, great deference is accorded to the discretion of often underqualified magistrates. By ruling that such deference is controlling even if the magistrate's probable-cause determination does not meet the *Gates* test, a weakening of the probable-cause standard is inevitable. The result will be an undermining of fourth-amendment rights through the subterfuge of denying a remedy in the event of an acknowledged violation. In the process, the Court made the correction of these deficiencies unlikely by effectively removing the issue of whether the fourth amendment had been violated from future search and seizure jurisprudence. The factual inquiry as to whether or not good-faith existed will substitute for constitutional interpretation. These ramifications are readily foreseeable, and the Court no doubt was cognizant of them when it reached the *Leon* result. Their existence indicates that the Court had a predetermined objective in mind, namely, the emasculation of the substantive protections of the fourth amendment.

*Sheppard*, at least at first blush, seems less objectionable than *Leon*. In *Sheppard*, unlike *Leon*, probable cause clearly existed. The *Sheppard* decision, however, is objectionable for two reasons. First, the reasoning of the Court suffers from the same deficiencies that

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<sup>319</sup> 422 U.S. 916 (1975).

<sup>320</sup> *Id.* at 920. The Court noted its reluctance to decide constitutional questions unnecessarily. *Id.* See also *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974) (federal courts are without power to decide questions that cannot affect the rights of the litigants before them). *Id.*

<sup>321</sup> See *Peltier*, 422 U.S. at 555 n.14 (Brennan, J., dissenting). In *Peltier*, Justice Brennan stated that: "[T]here is a clear precedent for avoiding decision of a constitutional issue raised by police behavior when in any case the evidence [is] admissible in the particular case at bar." *Id.*

<sup>322</sup> Brief for Respondent Leon at 27, *United States v. Leon*, 104 S. Ct. 3405 (1984).

<sup>323</sup> 622 F.2d 830 (5th Cir. 1980), *cert. denied*, 449 U.S. 1127 (1981).

<sup>324</sup> *Id.* at 840.

<sup>325</sup> *Sheppard*, 104 S. Ct. at 3428 n.5.

were present in *Leon*. Second, the *Sheppard* result makes clear that the Court was less than forthright when it indicated that the good-faith exception would be narrowly circumscribed.

As to the first objection, it is clear that *Sheppard* was wrongly decided if fidelity to the unitary model of prosecution is to be maintained. Under this model, it is apparent that judicial errors relating to the particularity requirement, no less than those relating to probable cause, cannot be rendered innocuous through police reliance. Seen in this light, the fortuity that the police stayed within the bounds of the affidavit can have no legal significance.<sup>326</sup>

Like the *Leon* opinion, the *Sheppard* decision points up the thinly veiled ulterior motives held by the majority and the disastrous consequences which this decision may have on fourth-amendment jurisprudence. A brief review of the four situations in which the good faith exception was not to apply will serve to expose these problems. The majority claimed that the good-faith exception could not be invoked where the magistrate was misled by information on an affidavit that the affiant knew, or should have known, was false.<sup>327</sup> Nor would the *Leon* rule apply in cases where the issuing magistrate wholly abandoned his judicial role.<sup>328</sup> The Court also stated that good-faith would be absent when officers relied on a warrant based on an affidavit "so lacking in probable cause as to render official belief in its existence entirely unreasonable."<sup>329</sup> Finally, the good-faith exception was not to apply when a warrant is "so facially deficient — i.e., in failing to particularize the place to be searched or the things to be seized — that the executing officers cannot reasonably presume it to be valid."<sup>330</sup>

This last exception exactly describes the situation in *Sheppard*. Though the affidavit was detailed,<sup>331</sup> the warrant did not mention the items to be sought or those that were eventually seized.<sup>332</sup> On its face the warrant was one for controlled substances.<sup>333</sup> If the "facial deficiency" exception to the *Leon* rule did not prevent the operation of the good-faith exception to the exclusionary rule in *Sheppard*, it is doubtful that it will ever be activated.

The Court's failure to follow the alleged limiting principles of *Leon* in a case handed down the same day is open to two interpretations, neither of which bodes well for the future of the fourth amendment. The optimist may view the failure of the Court to recognize that the facts of *Sheppard* fall squarely within the fourth exception as an oversight. This would simply indicate that "reasonable good-faith reliance on a warrant" is a concept incapable of exact interpretation and consistent application. A more cynical but more credible view is that *Sheppard* demonstrates that the good-faith exception is a pretext to effectuate the Burger Court's objective of squeezing the life out of the fourth amendment. Under this view, once the way to discretionary enforcement is opened, it quickly becomes a slippery slope with limitless potential for abuse.

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<sup>326</sup> See *Leon*, 104 S. Ct. at 3440 (Brennan, J., dissenting).

<sup>327</sup> *Id.* at 3421.

<sup>328</sup> *Id.* at 3422.

<sup>329</sup> *Id.*

<sup>330</sup> See *id.* at 3422.

<sup>331</sup> See *Sheppard*, 104 S. Ct. at 3427.

<sup>332</sup> See *id.*

<sup>333</sup> *Id.*



## CONCLUSION

In the aftermath of *United States v. Leon*, evidence obtained in a police search need not be barred from use in the prosecution's case-in-chief where an officer reasonably relies on a warrant which is later found to be invalid. The Court's ruling makes possible the use of evidence obtained pursuant to a search warrant that fails to provide an accurate description of the items to be seized. Together, *Leon* and *Sheppard* virtually destroy the utility of the fourth-amendment exclusionary rule.

This casenote has determined that *Leon* and *Sheppard* were both wrongly decided. The *Leon* majority's fundamental assumption that the purpose of the exclusionary rule is merely to deter police is contrary to both logic and precedent. In the realm of criminal justice, the branches of government are not atomic entities insulated from each others' actions. Rather they are component parts of the same evidence-gathering network. A transgression by one sector implicates the whole prosecution system. Certainly, a mistake by a judge cannot be cured by the failure of the police to detect the error. The proper unitary perspective recognizes that the effect on the citizen is the same regardless of the origin of the constitutional error.

*Sheppard*, like *Leon*, treats judges and police as "constitutional strangers"<sup>354</sup> to each other. But lack of particularity in a warrant, no less than lack of probable cause, is not eliminated by a police officer's reliance. Even so-called "technical" constitutional violations cannot be tolerated if government-wide compliance with the fourth amendment is to be achieved. Whether or not exclusion in *Sheppard* would have a deterrent effect on police misses the point. Such exclusion would restrain judges who are equally able to flout fourth-amendment rights.

Probably the most glaring defect in the *Sheppard* decision is that it fits neatly into one of the situations to which the Burger Court claimed the good-faith exception would not apply. Few warrants could present a clearer example of facial deficiency than that at issue in *Sheppard*. The *Sheppard* result raises grave doubt as to whether the *Leon* exception will be subject to any limitations.

Marc W. McDonald

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<sup>354</sup> See *Leon*, 104 S. Ct. at 3435 (Brennan, J., dissenting).